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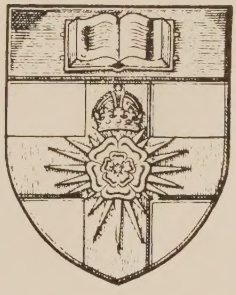

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re R. PHARAON ET FILS.

C. A.
1915
Oct. 20.

[1915 P. 145.]

Trading with the Enemy—Enemy Property—Shares in English Company—Vesting in Custodian—Right of Custodian to exercise Rights of Shareholder—Application to Court by Custodian for Directions—Locus standi of Company to appear—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *s.* 4, *sub-s.* 1; *s.* 5, *sub-s.* 1.

Where shares in an English company belonging to an alien enemy are vested in the custodian under s. 4, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, the custodian is entitled to do all acts which he can do in his character of shareholder in the company, and although he may be wise in applying to the Court for directions in particular cases, yet he has full power to do what may be necessary without such application, and an order made by the Court upon such an application in no way modifies his rights.

Semble, where in such a case the custodian applies to the Court for directions the company has no locus standi to appear and be heard on the application.

Decision of Younger J. affirmed.

APPEAL from a decision of Younger J.

The Leuctra Steamship Company, Limited, was an English company incorporated on July 1, 1915, under the Companies (Consolidation) Act, 1908, with a nominal capital of 17,000*l.* divided into 17,000 shares of 1*l.* each, of which 16,501 had been

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issued and were fully paid up. Of the shares issued 250 were held by Richard How Littlehales, the manager of the company, a British subject, one by John Holt, and the remaining 16,250 by R. Pharaon et Fils, a firm of alien enemies carrying on business at Beyrout in the Turkish Empire. There were no directors of the company.

The objects for which the company was established, as stated in clause 3 of the memorandum of association, were (inter alia): "(*a*) To purchase or otherwise acquire, own, and work the steamship 'Leuctra' . . . ." and "(*b*) In the event of the loss or sale of the said vessel, or of any substituted vessel to build, purchase, contract for, or otherwise acquire from time to time one or more other vessels or shares therein, but so that the company shall not work trade with or carry on the business of a shipowner with more than one vessel at one time and in any such case the objects herein mentioned shall apply to any vessel from time to time purchased or acquired."

The articles of association provided (inter alia) as follows:— Article 30: "The manager may at any time, and shall upon a requisition made in writing by one or more members, holding not less than one-eighth of the issued capital and entitled to vote, convene an extraordinary general meeting."

Article 31: "Any requisition so made shall express the objects of the meeting proposed to be called, and shall be signed by the requisitionists, and addressed to the manager, and shall be deposited at the office of the company, and upon receipt of such requisition the manager shall forthwith proceed to convene an extraordinary general meeting to be held at the office of the company. . . . . If within fourteen days from the receipt of the requisition, the manager does not proceed to convene such meeting, to be held within twenty-one days after such receipt, the requisitionists, or any of them, or any other member holding the requisite number of shares, may themselves convene an extraordinary general meeting . . . ."

Article 32: "If at any such meeting a resolution requiring confirmation at another meeting is passed, the manager shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution, and, if thought fit, confirming it as a special resolution, and if the manager does not convene the meeting

within seven days from the date of passing the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting."

On February 15, 1915, the Atlantic Patent Fuel Company, Limited, who were creditors of the alien enemies for 6733*l.* 15*s.* 1*d.*, obtained an order under s. 4, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, vesting the 16,250 shares belonging to the alien enemies in the Public Trustee as custodian.

On June 11, 1915, the steamship *Leuctra*, which had been purchased by the company and had earned considerable profits, was torpedoed and sunk by a German submarine off Aldburgh on a voyage from South America to Hull. Both ship and freight were insured for a considerable sum and the insurance moneys had been paid to the company, which had sufficient assets to pay all its creditors. The custodian had received in dividends sufficient to satisfy the claim of the Atlantic Patent Fuel Company, Limited.

On June 29, 1915, a summons was taken out by the creditors, asking that directions might be given to the Public Trustee to call meetings of the steamship company for the purpose of winding it up, and on July 27 an order was made by Younger J. which (so far as material) was in the following terms : " it appearing that the shares in the respondents, the Leuctra Steamship Company, Limited, mentioned in the said orders, dated respectively the 15th of February, 1915, and the 22nd of June, 1915, have been duly transferred to and are standing in the name of the Public Trustee, the custodian for England and Wales under the above-mentioned Act "—i.e. the Trading with the Enemy Amendment Act, 1914— " and the said custodian asking for such order in regard to the steps to be taken by him as shareholder in the said company as is hereinbefore contained, and the judge being of opinion that the said company and the shareholders therein other than the said custodian have no locus standi to be heard in opposition to the making such order, and being also of opinion that it is expedient for the purposes of the said Act that the said order should be made, doth order that the said custodian do take such steps as may be necessary for the purpose of convening and holding extraordinary general meetings of the said company whereby a proper resolution shall be submitted (as a special resolution) for the winding-up of the said company.

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And the custodian is to require a poll to be taken at the said meetings, and he is to be at liberty to vote thereat in favour of such resolution."

From this order the steamship company appealed.

Owen Thompson, for the steamship company. The object of the Trading with the Enemy Amendment Act, 1914, is to preserve enemy property until the end of the war, subject to the payment thereout of the enemy's just debts to creditors other than alien enemies. Both the preamble and s. 5 of the Act (1) contemplate that the property vested in the custodian should be retained by him until the end of the war. It was not intended by the Act that the custodian should deal with property vested in him as if he were beneficially interested in it. The words at the end of s. 4, sub-s. 1, of the Act are not apt to describe the exercise of rights attached to shares. Under s. 5 it is the duty of the custodian to "hold" the shares vested in him. Nothing is said in that section as to exercising rights. The custodian is the repository of enemy property and is subject to the orders of the Court as to the manner in which he is to deal with it. He has no doubt an inherent right to use the shares in question, but that right is dormant and ought not to be exercised without the direction of the Court. There is a difference between the position of an ordinary trustee and that of the custodian. The custodian is the creature of statute, and his rights and duties are defined by s. 5 of the Act. A trustee has other rights. The custodian says he would rather have money than shares, but that is not a sufficient ground for winding up the company. There are ample funds available by way of dividend to satisfy all the company's creditors, and the custodian has received by way of dividend more than sufficient to pay the Atlantic Fuel Company's claim. There is therefore no ground for winding up the company. To wind it up would be unjust to the shareholders other than the custodian. Unnecessary expense would thereby be entailed in forming another company after the war. The company is quite willing not to deal with the insurance moneys until after the war.

F. Whinney, for the Atlantic Patent Fuel Company, and *Austen-Cartmell*, for the custodian, were not called upon.

(1) See note on p. 6, post.

LORD COZENS-HARDY M.R. I think this is really not a case of any difficulty. Under the Trading with the Enemy Amendment Act, 1914, an order has been made under which a large block of shares in the Leuctra Steamship Company, an English company, has been vested in the custodian. The company was a shipping company owning only one ship. That ship has gone to the bottom, having been torpedoed. It was insured for a considerable amount, and the insurance money has been received by the company. The shares having been vested in the custodian by an order of the Court, the validity of which is not questioned, what is his position? It seems to me that he is in respect of that property a shareholder and entitled to do anything which in the character of shareholder he can do. As between himself and the company he is entitled to receive dividends payable in respect of those shares. What he must do with them when he gets them into his own hands is another matter. He is entitled to vote at any general meeting of the company which may be called. I do not see any possible answer to the contention that he is entitled to vote at any general meeting of the company on any proposition which may be put before it. Then one step further, has he not in his character of shareholder a right to exercise the powers conferred upon shareholders by the articles of association of the company? I have the articles of association before me, and they contain special provisions for making a requisition calling upon the manager to convene a special general meeting of the company, and there is also a provision that if the manager does not comply with the requisition within a certain time the shareholder who has signed the requisition may himself call the meeting. That right is incident to the property which is vested in the custodian. It seems to me that although the custodian was wise in applying to the Court (and nothing that I say is intended to impute any doubt as to the propriety of his asking the opinion of the Court) yet as at present advised I think he had full power without making such application to do what is mentioned in the order appealed against, that is to say, to take such steps as may be necessary for convening and holding the extraordinary general meeting as directed by the order. The sanction of the Court to his exercising his rights as a shareholder in this particular manner does not in any way modify or affect those rights. In my opinion the appeal fails, and although

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I have listened to Mr. Owen Thompson, I feel very great doubt whether he had any right to be listened to at all.

BANKES L.J. I agree. It seems to me that the order vesting these shares in the custodian carried with it the right to exercise the ordinary rights of a shareholder, and therefore, except for the purpose of complying with any direction of the Court or protecting himself, the custodian need not have come to the Court to ask for leave to exercise his powers as a shareholder. That being so, it is not necessary to decide whether the last words of s. 4, sub-s. 1, of the Act would give the Court a right to grant the leave asked having regard to the inherent rights which the custodian has as a shareholder. It seems to me that the learned judge had jurisdiction to direct the custodian as to whether it was a wise or proper thing for him to exercise his power as a shareholder in the manner proposed, and that being so we certainly cannot interfere with the discretion which the learned judge, as it seems to me, so clearly had.

WARRINGTON L.J. I agree, and I think it is unnecessary for me to add anything further.

Appeal dismissed with costs.

Solicitors: *Chester, Broome & Griffithes, for Risque & Robson, Manchester; Botterell & Roche; Coward & Hawksley, Sons & Chance.*

NOTE.—Trading with the Enemy Amendment Act, 1914, preamble: "Whereas it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as 'enemies'), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies; and to make other provisions for preventing trading with the enemy: Be it therefore enacted," &c.

Sect. 4, sub-s. 1: "The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights,

whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the custodian or any Government Department, by order vest in the custodian any such real or personal property as aforesaid, if the Court or the judge is satisfied that such vesting is expedient for the purposes of this Act, and may by the order confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the Court or judge may seem proper."

Sect. 5, sub-s. 1: "The custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct.

"(2.) The property held by the custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the custodian may, if so authorised by an order of the High Court or a judge by whose order any property belonging to an enemy was vested in the custodian under this Act, or of any Court in which judgment has been recovered against an enemy, pay out of the property paid to him in respect of that enemy the whole or any part of any debts due by that enemy and specified in the order:

"Provided that before paying any such debt the custodian shall take into consideration the sufficiency of the property paid to or vested in him in respect of the enemy in question to satisfy that debt and any other claims against that enemy of which notice verified by statutory declaration may have been served upon him.

"(3.) The receipt of the custodian or of any person duly authorised to sign receipts on his behalf for any sum paid to him under this Act shall be a good discharge to the person paying the same as against the person or body of persons in respect of whom the sum was paid to the custodian.

"(4.) The custodian shall keep a register of all property held by him under this Act which register shall be open to public inspection at all reasonable times free of charge. . . . ."

W. I. C.

C. A. 1915 Oct. 25.

In re HAVANA EXPLORATION COMPANY, LIMITED. NATHAN'S CLAIM.

[00274 of 1914.]

Company—Winding up—Preferential Payments—Salary and Wages—Voluntary Winding up followed by Compulsory Winding up—Commencement of Winding up—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-ss.* 1 (*b*), 5; *ss.* 139, 183.

Where a voluntary winding up of a company is succeeded by a compulsory order, the four months for which a clerk or servant can claim preferential payment of wages are the four months next before the resolution for a voluntary winding up. Sect. 209 deals with the winding up of a company as one continuous process which may be commenced as a voluntary and continued as a compulsory winding up, and there is nothing to show that persons who have acquired preferential rights under the voluntary winding up are to be deprived of them if a compulsory order is made.

Decision of Neville J. reversed.

Appeal from a decision of Neville J.

Cecil Nathan, the applicant in this case, was a servant of the Havana Exploration Company, Limited, under an agreement of service for three years from February 1, 1911, at a salary of 600*l.*, 700*l.*, and 800*l.* for the three years respectively. The company went into voluntary liquidation on June 23, 1913. The voluntary liquidator of the company admitted the applicant as a preferential creditor for 50*l.* in respect of unpaid salary. On July 9, 1914, a petition was presented for the compulsory winding up of the company; and on July 21, 1914, the usual order was made. Cecil Nathan lodged a proof in the winding up for 750*l.* in respect of salary due under his agreement, of which he claimed that 50*l.* should be admitted as a preferential debt.

On May 22, 1915, the official receiver, who was the liquidator, rejected the claim to rank for preferential payment on the ground that no services in respect of which the claim for salary was made were rendered to the company within four months before the date of the commencement of the winding up by the Court. Nathan took out a summons in the winding up, asking that the decision of

the official receiver and liquidator rejecting his claim might be reversed.

Neville J. held that the four months for which Nathan could claim preferential payment of wages were the four months next before the date of the petition for a compulsory order, and not the four months next before the resolution for a voluntary winding up.

Nathan appealed.

Percy F. Wheeler, for the appellant. The case of a compulsory winding up order made after a voluntary winding up has commenced is not specially mentioned, although it is provided for in s. 209, sub-s. 5 (*b*), of the Companies (Consolidation) Act, 1908 (1), but the natural construction would be that the commencement of the winding up should be the resolution for voluntary winding up; for after that date the employees cannot get their salaries paid by the company, and it would be very unfair that the mere continuance of the voluntary winding up for four months before the compulsory order was made should deprive them of the right of priority of payment of salary which they possessed at the commencement of the voluntary winding up. *In re Taurine Co.* (2) was relied on by the learned judge, but it is no authority on this point. It was a decision, on a different section, that for the purpose of ascertaining who can be placed on the B list of contributories under s. 38 of the Act of 1862 (which is identical with s. 123 of the Act of 1908) the winding up must be taken to have commenced, under s. 84, with the

(1) Sect. 209: "(1.) In a winding up there shall be paid in priority to all other debts . . . .

"(*b*) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date not exceeding 50*l*. . . . .

"(5.) The date hereinbefore in this section referred to is—

"(*a*) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

"(*b*) in any other case the date of the commencement of the winding up."

Sect. 139: "A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

Sect. 183: "A voluntary winding up shall be deemed to commence at the time of the passing of the resolution authorising the winding up."

(2) (1883) 25 Ch. D. 118.

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petition for a compulsory winding up, not with a previous resolution for a voluntary winding up. We contend that for the purpose of fixing preferential rights of salaries a compulsory winding up which follows a voluntary winding up is treated as one process and begins with the resolution for voluntary winding up. It comes within s. 209, sub-s. 5 (*b*).

In re Taurine Co. (1) was followed in *In re Russell Hunting Record Co.* (2), but that decision depended on s. 164 of the Companies Act, 1862, which is repeated in s. 210 of the Act of 1908 and does not touch this point. *Midland Counties District Bank* v. *Attwood* (3) was relied on by Neville J., but it turned on the Preferential Payments in Bankruptcy Act, 1888, s. 1, and was not a decision on this sub-section: Companies Act, 1907, s. 30. With that object the word "next" is omitted from s. 209, sub-s. 1 (*b*), of the Act of 1908. The reason given for the decision in *Ex parte Fox* (4), that after the appointment of an interim receiver the servants could no longer get their wages, applies here.

Croom-Johnson, for the liquidator. Sect. 209 uses the phrase "commencement of the winding up," which appears frequently in the Act and must always be interpreted in the same way—e.g., s. 211—and it means the presentation of the petition: s. 139. Sect. 209 alters the rights of the general body of creditors and must be construed strictly. If the date intended is that of the commencement of the voluntary winding up s. 198 is unnecessary. Where a compulsory order follows a voluntary winding up the official liquidator (in this case the official receiver) would have had no control over the proceedings in the voluntary winding up. The object of the Act was to provide for all the proceedings being regulated by the compulsory winding up: *In re United Service Co.* (5); *Cleve* v. *Financial Corporation.* (6)

No reply was called for.

LORD COZENS-HARDY M.R. This case raises a curious point which I think has not been previously raised in any reported case. The material facts are very few. The company was voluntarily

(1) 25 Ch. D. 118.
(2) [1910] 2 Ch. 78.
(3) [1905] 1 Ch. 357.
(4) (1886) 17 Q. B. D. 4.
(5) (1868) L. R. 7 Eq. 76.
(6) (1873) L. R. 16 Eq. 363.

wound up in June, 1913, and a liquidator was appointed. At that date the present appellant was a clerk or a servant in the employment of the company, and he claims, under s. 209 of the Companies (Consolidation) Act, 1908, to the extent of 50*l.*, to be paid in preference to every one else. He says that because by the opening words of s. 209, "In a winding up there shall be paid in priority to all other debts," inter alia, sub-s. (*b*), "All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds." He sent in his claim to the voluntary liquidator. The money was not paid, but the liquidator included him in the list of creditors, and so far as he could he admitted the claim. Has anything happened to deprive the appellant of that right which is a statutory right? It is said that this circumstance does so. In July, 1914, a compulsory order was made, and the effect of that undoubtedly was that the voluntary liquidator was ousted. The existing winding up order is undoubtedly a compulsory order, and the liquidator under the compulsory order happens to be the official receiver; he is the person whose duty it now is to get in the assets of the company and to administer them according to law; and the question which arises is, What is the right given by s. 209 to the appellant? In order to answer that question we must look at one or two other sections. Sect. 209, sub-s. (*a*), dealing with parochial rates, says: "All parochial or other local rates due from the company at the date hereinafter mentioned"; they are the same words as those mentioned in sub-s. (*b*), the words being "before the said date," which carries us back to "at the date hereinafter mentioned." In sub-s. 5 there are two cases dealt with: "The date hereinbefore in this section referred to is (*a*) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order." Now it is quite clear that this company is not within sub-s. (*a*), because it had commenced to be wound up voluntarily a year before. That voluntary winding up order, which had commenced according to the language of the section, seems to me to meet exactly what is found in sub-s. 5 (*b*), "in any other case the date of the commencement of the winding up." What is the date of the commencement of the winding up in this case? It seems to me

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to be that which in sub-s. 5 (*a*) is contemplated as that of a company previously commenced to be wound up. That being so, the only thing that this means is, not that the official receiver, the liquidator under the compulsory order, is bound by the decision of the voluntary liquidator if his decision is disputed (here it is not disputed, because the facts are agreed), but that if it is disputed the claimant must come in and prove it. Then, if his position as a servant of the company during the four months is either proved or admitted, the compulsory liquidator is bound, in the administration of the assets by him, to pay this to the extent of 50*l.* as one of the preferential debts of the company. That seems to me really to be the whole of this case. Every point that could be urged has been put before us by Mr. Croom-Johnson, but I am bound to say, with great respect to the learned judge, I have not been able to appreciate the difficulties of the case.

It is said, however, that there are two authorities which bind us, as well as the learned judge, to decide otherwise. One is that under s. 38 of the old Act (s. 123 in this Act) it was held by a majority of the Court in *In re Taurine Co.* (1) that when the order of events is that which happened here, a voluntary winding up followed by a compulsory winding up, the date ranks from the second, the compulsory order, and not from the voluntary winding up order. That seems to me to have very little bearing on the present case. The language was quite different: there was nothing equivalent to s. 209, sub-s. 5; there was no such vested right as it is sought to take away from the creditor in the present case.

The other case is the comparatively recent decision of Swinfen Eady J. in *In re Russell Hunting Record Co.* (2) That case again seems to me to create no difficulty. That was a case under the following section, s. 210, which is sometimes referred to as the fraudulent preference section; and sub-s. 2 is in language which I should have thought was quite clear: "For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual." There was no such language there as is

(1) 25 Ch. D. 118. (2) [1910] 2 Ch. 78.

found in the present case, namely, a statutory contemplation of the event that there may be first a voluntary winding up and next a compulsory winding up, and what is to happen in that case. In my opinion the appeal must be allowed, and the appellant must be admitted to the position of a preferred creditor to the extent of 50*l*.

BANKES L.J. I agree. In my opinion the authorities to which we have been referred really do not touch the question which we have to decide, which depends upon the proper construction to be put upon s. 209. In order to arrive at that construction it is necessary to consider not only the language of the section, but the object for which it was passed. The object with which the section was passed is quite plain. It was passed to create certain statutory preferential claims in favour of the persons mentioned in the section in the event of the ordinary carrying on of the business of the company being interrupted by a winding up. That was the object of the section, and the persons intended to be benefited were persons who come within the various sub-sections which are appended to the section. The section itself deals with the winding up of a company, and I think it is plain that it deals with that winding up as a process, and a continuous process. It may be commenced as a voluntary winding up and it may be continued as a compulsory winding up, but the section speaks of it as one continuous process. Sub-s. 5 (*a*) speaks of the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, and therefore it contemplates the winding up commencing in one way and being continued in another, but for the purpose of the section being one continuous process. It is in a process of that kind, in a winding up of that kind, that there shall be priority to all other debts given to those that are mentioned; and in order to define what particular classes of persons and debts come within the preference created by the section, it speaks of them as either wages or salary or parochial or other local rates, or whatever it may be, which either become due at the date thereinafter mentioned or in respect of services rendered to the company during a certain period before a certain date, and so forth; and you have to look at the end of the section to see what the date referred to is. Then you find that in sub-s. 5, which is split up into two sub-sections, the second sub-

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section is applicable to this case; and it seems to me impossible to accept the argument that is presented to us on behalf of the respondents, because if the section were written out in full it would be: "In the case of a company ordered to be wound up compulsorily, and which had previously commenced to be wound up voluntarily, the date of the winding up." Now, which winding up? Which of those two? They are both mentioned. Why should the compulsory winding up be accepted rather than the voluntary, when the whole scheme of the section is to benefit the persons who are in a particular position at the date of the commencement of this process of winding up, and to whom the section has given this statutory preferential claim? What is there in the section to indicate that, in the events which happened here, namely, the commencement of the winding up voluntarily, the persons who had already acquired those statutory preferential claims were to be deprived of them, possibly in favour of other people who had come into the service of the company after the commencement of the winding up and after the company had altered its status? I entirely fail to see any ground upon which the learned judge's view of the section can be supported, and I think this appeal ought to be allowed.

WARRINGTON L.J. I agree. Sect. 209 by sub-s. (*b*) gives to a clerk or servant a preference to the extent of 50*l.* in respect of services rendered to the company during four months before a certain date. That date is defined by sub-s. 5 (*a*) in these words: The date is, "in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order, and (*b*) in any other case the date of the commencement of the winding up"; that is to say, and in a case in which the company has been ordered to be wound up compulsorily and has previously commenced to be wound up voluntarily the date of the commencement of the winding up. I cannot see any other construction which can be put upon sub-s. (*b*) except that the winding up there referred to is the winding up which has previously been referred to under the words "previously commenced to be wound up," treating the whole winding up as, for this section, one continuous winding up. What we are deciding is on this section only, and the authorities which have been cited to us

refer to other sections and seem to me neither to affect our judgment nor to be affected by it.

Appeal allowed.

Solicitors: *Maddison, Stirling, Humm & Davies; Gush, Phillips, Walters & Williams.*

H. C. R.

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In re ASPINALL'S SETTLED ESTATES. ASPINALL *v.* ASPINALL.

[1915 A. 476.]

NEVILLE J. 1915 *Oct.* 13, 14.

Settlement—Real Estates—Power to sell and re-invest in Land—Sales by Tenant for Life—Disentailing Assurance—Resettlement—Proceeds of Sale to be held "as capital moneys arising under Settled Land Acts, 1882 to 1890"—Personalty or Realty—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 21, 22, 24.

In 1865 real estates were settled by a will, in the events which happened, to the use of A. for life, with remainder to his eldest son (the plaintiff) in tail male, with remainders over. The will contained usual powers of sale with trusts to re-invest the proceeds of sales in lands to be held upon the same uses and trusts as the settled estates. In 1899 the plaintiff and A. disentailed and resettled the estates to the use of A. for life in restoration of his life estate under the will, with remainder to the plaintiff for life, with remainder to the plaintiff's first and other sons successively in tail male, with remainders over.

At the date of the disentailing deed there was in the hands of the trustees of the will a sum of 15,000*l.*, being proceeds of sale of parts of the settled estates which A. had sold under the powers conferred on him as a tenant for life by the Settled Land Acts, 1882 to 1890. This sum was also disentailed and settled to such uses as the plaintiff and A. should by deed jointly appoint, and by the resettlement they appointed that sum to be held by the trustees "as capital moneys arising under the Settled Land Acts 1882 to 1890 from the premises thereby settled." The plaintiff's only son died in infancy, and the question arose whether the 15,000*l.*, which had not been re-invested in land, was real estate, or whether it vested in reversion in the plaintiff's infant son absolutely as personalty:—

Held, that the disentailing deed entirely put an end to the limitations and trusts of the will, that the resettlement of the

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15,000*l.* as capital moneys under the Settled Land Acts did not impress it with the character of realty, and that it vested in reversion in the plaintiff's infant son absolutely as personalty.

In re Walker [1908] 2 Ch. 705 applied.

ADJOURNED SUMMONS.

Thomas Aspinall, by his will dated September 17, 1857, devised all his real estates to trustees to the use of his son Ralph Aspinall for life, with remainder to the use of the first and every other son of Ralph Aspinall successively in tail male, with remainders over. The will conferred on Ralph Aspinall power to appoint a jointure of 600*l.* a year to any woman he might marry, and also power to charge the estates with 5000*l.* for portions for his younger children and to create terms of years for securing the same respectively. The will also gave the trustees a power (which was not exercised) to sell any part of the settled estates with the consent of any tenant for life, and to apply the proceeds of such sales towards the discharge of incumbrances and to invest the surplus (if any) of such proceeds in the purchase of real estate to be settled to the same uses and upon the same trusts as the testator's real estates. And the will empowered the trustees to make interim investments as therein mentioned.

The testator died in November, 1865.

In 1876 Ralph Aspinall married, and by his marriage settlement, in exercise of the powers given to him by the will, charged the settled estates with a jointure of 600*l.* a year for his wife for life in case she should survive him (which happened) and with 5000*l.* as portions for the younger children of the marriage, and limited terms of years for securing the same respectively.

The plaintiff, John Aspinall, who was the eldest son of Ralph Aspinall, attained his age of twenty-one years in April, 1899.

At the date of the disentailing assurance next after stated there was in the hands of the trustees of the will a sum of about 15,000*l.*, which represented the proceeds of sale of parts of the settled estates that Ralph Aspinall had from time to time sold under the powers conferred on him as a tenant for life by the Settled Land Acts, 1882 to 1890.

By deed dated July 8, 1899, John Aspinall, with the concurrence of Ralph Aspinall as protector of the settlement, disentailed

the real estates settled by the will and conveyed the same "to such uses upon such trusts and subject to such powers and provisions as" Ralph Aspinall and John Aspinall should at any time or times by any deed or deeds jointly appoint, and in default of such appointment to the use of Ralph Aspinall for life in restoration of the life estate limited to him by the will, with remainder to the uses, upon the trusts, and subject to the powers to, upon, and subject to which under the will the same premises stood limited and settled immediately before the execution of the disentailing deed; and by the same deed John Aspinall, with the concurrence of Ralph Aspinall as protector of the settlement, granted to T. Orford and his heirs the said sum of 15,000*l.* and all other (if any) the moneys, stocks, funds, and securities which were or might be liable to be laid out in the purchase of lands to be settled to the uses of the will, to hold the same unto the said T. Orford and his heirs freed from the estate tail male of the said John Aspinall and all estates, rights, and powers to take effect after the determination of such estate tail male, "upon such trusts and subject to such powers and provisions as Ralph Aspinall and John Aspinall" should at any time or times thereafter by deed or deeds jointly appoint, and in default of such appointment upon trust for Ralph Aspinall for life in restoration of the life estate limited to him by the will, and, subject to such life estate, upon the trusts and subject to the powers and provisions to, upon, and subject to which under the will the same premises stood limited and settled immediately before the execution of the disentailing deed, and so as to restore and confirm the same trusts, powers, and provisions.

By deed dated July 10, 1899, Ralph Aspinall and John Aspinall, in exercise of the joint power of appointment reserved to them by the disentailing assurance, resettled the real estates (subject to the jointure and portions created by the deed of March 13, 1876, and to the terms of years limited for securing the same respectively) to such uses, upon such trusts, and subject to such provisions as Ralph Aspinall and John Aspinall should by any deed or deeds jointly appoint, and in default of such appointment to the use of Ralph Aspinall for life in restoration of the life estate limited to him by the said will, with remainder to the use of John Aspinall for life, with remainder to the use of the first and every other son of John Aspinall

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successively in tail male, with remainders over. And by the same deed Ralph Aspinall and John Aspinall, in further exercise of their said joint power of appointment, did thereby as settlors appoint and direct that the said sum of 15,000*l.* so held by the trustees of the said will and all other (if any) the moneys, stocks, funds, and securities which were then liable to be laid out in the purchase of lands and hereditaments to be settled to the uses of the said will should thenceforth go and be transferred to the defendants Lloyd and Worsley-Taylor, their executors, administrators, and assigns, upon trust to hold the same "as capital moneys arising under the Settled Land Acts 1882 to 1890 from the premises thereby settled but not so as to increase or multiply charges."

In 1901 the plaintiff married, and a settlement was executed by which a jointure and portions were charged on the settled estates in favour of his wife and the issue of their marriage. By this marriage the plaintiff had issue two children and no more, namely, a daughter, and a son born in July, 1910, who died a few hours after his birth. In March, 1915, the plaintiff took out letters of administration to the estate and effects of his deceased infant son.

Ralph Aspinall died in May, 1913.

A question having arisen whether the said sum of 15,000*l.* was effectually converted into real estate by the resettlement of July 10, 1899, or whether it remained personal estate and vested absolutely n reversion in the infant son of the plaintiff at his birth, this summons was taken out to determine the matter.

The defendants Lloyd and Worsley-Taylor were the present trustees of the will and of the resettlement.

The 15,000*l.* had been invested on mortgage, but had been recently paid off and was now in the hands of the defendant trustees. It was conceded that this sum as well as the settled real estates were subject to the jointure and portions charged by the marriage settlement of 1876. The portions were payable but had not been raised.

Jenkins, K.C., and *P. B. Lambert*, for the plaintiff. At the date of the disentailing deed the 15,000*l.* was liable to be re-invested in land, but by that deed the limitations and trusts created by the will were put an end to, and it was competent for the plaintiff and his father to treat the fund as personalty and to deal with it in any way

they liked under their joint power of appointment. They were the absolute owners of it: *Rous* v. *Jackson.* (1) By the resettlement they declared that it was to be held by the trustees as capital moneys under the Settled Land Acts, but that declaration was not sufficient to impress it with the character of realty, there being no imperative duty on the trustees of the resettlement to re-invest in land. It cannot be notionally converted into land so that it goes as land. Sects. 21 and 22 of the Settled Land Act, 1882, prescribe the manner in which capital moneys may be dealt with and invested, and in *In re Walker* (2) it was held that personalty directed by a testator to be held as capital moneys under the Acts remained personalty until invested in land. It is submitted, therefore, that this fund remained personalty and vested in the plaintiff's infant son for an estate tail so that he became absolutely entitled to it, and on his death it was payable to his legal personal representative.

Peterson, K.C., and *L. Chubb*, for the remaindermen. *In re Walker* (2) is distinguishable. There the fund in its inception was residuary personal estate. Here it was real estate, and its proceeds of sale were subject at the date of the disentailing deed to an imperative trust to re-invest in land. It was impressed with the character of real estate, and the question is whether there has been an election by the parties entitled to treat it as personalty. It is treated as land by the disentailing deed, and the appointment did not amount to an election to treat it as personalty. No doubt they were absolutely entitled to it under the disentailing deed, but they did not put an end to the settlement altogether having regard to the limitations in default of appointment. The appointment only operated to discharge the estates limited in the land and did not alter the character of the property itself. It is submitted that the fund remained impressed with the character of real estate and, having regard to s. 21, sub-s. 7, s. 22, sub-s. 5, and s. 24 of the Act, must be considered as land subject to the limitations in the resettlement.

Dighton Pollock, for the trustees.

NEVILLE J. In this case a sum of about 15,000*l.*, subject to be re-invested in real estate to be held on the limitations and trusts of

(1) (1885) 29 Ch. D. 521, 525. (2) [1908] 2 Ch. 705.

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lands in strict settlement, arose from the sale of parts of the settled lands. The sales were made by a tenant for life under the powers conferred on him by the Settled Land Acts. Then the tenant for life and the tenant in tail disentailed the 15,000*l.* and put an end to the limitations and trusts of the settlement. They executed two deeds. By the disentailing deed they provided in the first instance that the 15,000*l.* should be held upon such trusts as they should by any deed jointly appoint and provided for its destination in default of appointment, and then by the resettlement they exercised their joint power of appointment. I think that when they exercised their power of appointment they became absolute owners of the fund, and that it is immaterial whether up to then it is treated as land or money, because under the power of appointment they could do what they liked with it. When they resettled it by exercising the power of appointment they settled it by reference to the Settled Land Acts. It was to be held by the trustees as capital moneys under the Acts. The result of that is that it might be invested in the purchase of lands, but Parker J. has decided in *In re Walker* (1)—and I respectfully agree—that such a referential trust will not operate to convert personalty into realty. There must be an imperative trust for conversion. I feel no doubt that this referential trust did not operate to convert this money notionally into land. It remained personal estate, and on the death of the infant son of the plaintiff it was payable to his legal personal representative subject to any then existing incumbrances.

Solicitors: *Greenfield & Cracknall; W. J. & E. H. Tremellen, for Baldwin, Weeks & Baldwin, Clitheroe.*

(1) [1908] 2 Ch. 705.

H. L. F.

MAXIM *v.* GODSON & SONS.

NEVILLE J.

1915

Oct. 13, 29.

[1914 M. 2918.]

Practice—Taxation—Costs—Third Expert Witness—Rules of the Supreme Court, Order LXV., *r.* 27, *sub-rr.* 29, 38.

There is no general rule of practice that, on taxation of the costs of a successful party in an action where expert evidence has been adduced at the trial, the costs of only two expert witnesses are to be allowed.

At the trial of an action to restrain a nuisance three expert witnesses were called on behalf of the plaintiff, the third expert being examined and cross-examined without objection from the Court or by the counsel for the defendants. The plaintiff obtained judgment with costs.

On taxation of the plaintiff's costs the taxing Master disallowed the costs of the third expert witness on the ground that as a general rule only two expert witnesses ought to be allowed :—

Held, that the Master had exercised his discretion wrongly, and that the costs of the third expert witness ought to be allowed.

ADJOURNED SUMMONS.

This was an application to review the taxing Master's decision in these circumstances.

On January 18, 1915, the plaintiff obtained judgment in the action for an injunction restraining a nuisance with costs, and an inquiry as to damages. The nuisance was the noise and vibration arising from the defendants' machinery in the adjoining premises, which caused injury to the structure of the plaintiff's house and affected the health of its inmates. The trial occupied three days, a number of witnesses being called on both sides. The plaintiff called three expert witnesses, namely, Mr. Chatfield Clarke (an architect), Mr. Messenger (a surveyor), and Mr. Lovell (an architect and surveyor).

On taxation of the bill of costs of the plaintiff's solicitor the Master allowed the charges for Mr. Chatfield Clarke and Mr. Messenger, but disallowed the charges for Mr. Lovell. The plaintiff carried in an objection to this disallowance, which stated : "The plaintiff in selecting this witness was not influenced or guided in any way by the number of those engaged by the defendants, but he was engaged

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by the plaintiff's advisers in the exercise of their discretion as to what was necessary for obtaining justice and bringing the case properly before the Court. Mr. Lovell's proof itself shows upon a perusal of it that it touches upon many special points not touched upon by Mr. Chatfield Clarke or Mr. Messenger. Mr. Lovell was the chief witness relied on by the plaintiff in relation to the effects of the vibration of the ground and the consequent shaking of the house and of the signs and evidence produced by such vibration and the cracks. He was an absolutely necessary witness to obtain justice in this case. It would have been absolutely unsafe to have gone to trial without this witness in addition to Mr. Chatfield Clarke and Mr. Messenger."

The taxing Master's answer to the objection was as follows :—

"I heard the parties at great length on the taxation and both sides brought in objections running together into some seventeen brief sheets. I am asked however to answer one only, viz., that of the plaintiff's No. 8, being the disallowance of Mr. Lovell an architect and expert witness.

"The plaintiff called four expert witnesses, namely, Mr. Chatfield Clarke, Mr. Messenger, Mr. Lovell, and Dr. Stubbs, and I disallowed one of those experts, viz., Mr. Lovell.

"I heard the plaintiff's solicitor at great length again on his objections to this disallowance, and having done so I am confirmed in the decision at which I arrived and I am satisfied that I exercised my judgment rightly in the disallowance.

"The general but by no means universal rule is to allow two expert witnesses, and I am not able to see anything so special in this case as to justify Mr. Lovell's allowance.

"As to the fourth expert, Dr. Stubbs, I should state that on the taxation he was treated as a witness of fact and I allowed him a fee on that footing. On the objection it turned out that he was also an expert speaking as to the effect of the noise and vibration on health and no objection being taken his allowance as a witness stood.

"It was contended before me by the plaintiff's solicitor that the defendants had four expert witnesses. I have read all the proofs of the defendants' witnesses and the plaintiff's solicitor is mistaken. The defendants had two expert witnesses only.

"I overrule the objection."

Thereupon on May 12, 1915, the plaintiff issued a summons that his objection relating to Mr. Lovell's fees and expenses as a witness might be allowed and that the Master might be directed to vary his certificate accordingly.

Jenkins, K.C., and *T. T. Method*, for the summons. The question is whether the costs of a witness, who was called at the trial and examined and cross-examined without objection, should be disallowed because he was the third expert witness. It is submitted that the costs of such a witness are not within the absolute discretion of the taxing Master.

[NEVILLE J. Is there any authority on the point ?]

J. F. Galbraith, for the defendants. The nearest case is *Oliver* v. *Robins* (1), where Kekewich J. held that he had no jurisdiction to interfere with the taxing Master's discretion in allowing the costs of a witness.

Jenkins, K.C. That is a very meagre report, and it is submitted does not apply. Sub-rr. 29 and 38 of r. 27 of Order LXV. state the matters that are in the discretion of the taxing Master. The quantum of fees and expenses to be allowed a witness are in his discretion, but where a relevant witness has been called and examined at the trial without objection the taxing Master is not entitled to go into the matter and to say to the successful party "two expert witnesses were sufficient for you." The taxing Master's answer is based on an alleged general rule that only two expert witnesses are to be allowed, but there is no case and no rule of Court that lays down such a general rule of practice. No doubt in actions where expert evidence is called counsel generally agree that not more than two expert witnesses shall be called on any given point, but that is a matter of convenience and not a hard and fast rule. If a witness is called whose evidence is material and who is examined, it is not for the taxing Master to go into the case and to decide whether or not the costs of the witness should be allowed.

J. F. Galbraith, for the defendants. It is submitted that the discretion of the taxing Master should not be interfered with. He has a twofold discretion, a special discretion as to the scale of costs in Appendix N and a general discretion under sub-rr. 29 and 38,

(1) (1894) 43 W. R. 137.

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and the Court will be slow to overrule his discretion: *Oliver* v. *Robins* (1); *Boswell* v. *Coaks*. (2) Here his answer shows that he went into the matter with great care and acted under sub-r. 29 in disallowing the costs of this witness as incurred through over-caution.

Cur. adv. vult.

Oct. 29. NEVILLE J. This is a case in which the taxing Master has disallowed the fees and expenses of a third expert witness called by the successful party. The taxing Master in his answer to the plaintiff's objection gave the following ground for his decision. He says "The general but by no means universal rule is to allow two expert witnesses, and I am not able to see anything so special in this case as to justify Mr. Lovell's allowance." I have made inquiries and have ascertained that there is no such general rule in taxation. That being so, I am of opinion that the Master has not properly exercised his discretion in this case. It appears to me that an expert witness who is called at the trial by the successful party and examined and cross-examined ought, in the absence of direction by the Court, to have his charges and expenses allowed on taxation unless there is some special reason for disallowing them. I allow the plaintiff's objection, and the taxation must go back to the Master with a direction to vary his certificate by allowing the costs of this witness.

Solicitors: *Firth & Co.; Smith, Rundell & Dods.*

(1) 43 W. R. 137. (2) (1887) 36 Ch. D. 444, 448.

H. L. F.

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Oct. 22, 26.

In re CROCKER.
CROCKER *v.* CROCKER.

[1915 C. 1829.]

Will—Construction—Hotchpot Clause—Specific Stocks settled by Testator on his Daughters in his Lifetime—Diminution in Value at Testator's Death—Date at which Value of Stocks should be ascertained when brought into Hotchpot—Estate Duty in respect of Settled Properties—Deduction in ascertaining Value.

A testator who died in 1914 had in his lifetime settled certain stocks on two of his daughters and their children, and these stocks had depreciated in value at the time of his death. By his will he gave his residuary estate in trust for all his children equally, subject to a proviso that for the purposes of division there should be brought into hotchpot, in respect of each of the two daughters or her children, the value of the trust funds which he had settled upon them. It was conceded that, under s. 2, sub-s. 1 (*c*), and s. 9, sub-s. 1, of the Finance Act, 1894, the estate duty payable in respect of the portion of the settled funds which were settled within three years of the testator's death must be borne by those funds:—

Held, that the sum to be brought into account under the hotchpot clause in respect of all the settled funds was the value of all the settled funds at the date of settlement (and not at the date of the will) less the estate duty payable in respect of the funds settled within three years of the testator's death.

Watson v. *Watson* (1864) 33 Beav. 574 and *In re Beddington* [1900] 1 Ch. 771 followed.

Thomas Edwin Crocker, by his will dated September 16, 1912, appointed John Hedley Crocker and James Phillips (the plaintiffs in these proceedings), Dora Frances Engledue (a defendant), and Ada Bushby executors and trustees thereof, and gave his residuary real and personal estate to his trustees upon trust for his children equally. The will then contained the following proviso: "Provided always, that, for the purposes of division, there shall be brought into hotchpot in respect of my daughter Dora Frances Engledue, or her children, the value of the trust funds which I have settled or may hereafter settle upon her and her children, and in respect of the share of my daughter Amy Margaret Holt, or her children, the value of the trust funds which I may hereafter settle upon her and her children."

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By a codicil made on March 7, 1914, which was otherwise immaterial, the testator revoked the appointment of Dora Frances Engledue and Ada Bushby as executors and trustees, and he died on the following day.

He had by a settlement dated August 31, 1908, settled certain stocks, which had been transferred to the trustees of the settlement (who were the plaintiffs and the testator), upon trusts in favour of Mrs. Engledue and her husband and children.

By another settlement, dated after the will, namely, October 21, 1912, further funds were settled by the testator upon the same trusts.

By a settlement of the same date the testator settled certain stocks and shares which had been transferred to the trustees of the settlement (who were the testator and the defendants Allever Bushby and Thomas Hedley Phillips) upon trusts in favour of Mrs. Holt and her husband and children.

The testator left five children, namely, Mrs. Engledue, Mrs. Holt, and the defendants John P. Crocker, Reginald T. Crocker, and Madeline S. T. Blyth. On the marriage of the lastly named defendant there had been no settlement.

The value of the stocks comprised in the first Engledue settlement was at the date of that settlement 13,245*l.*, and the value of the funds comprised in the second Engledue settlement was 3620*l.* at the date thereof, but at the date of the testator's death the total value of these stocks and funds was only about 13,975*l.*

The value of the stocks and shares comprised in the Holt settlement was at the date of that settlement 13,127*l.*, but at the date of the testator's death their value was only about 10,818*l.*

The estate duty payable on the funds comprised in the second Engledue settlement and the Holt settlement, both of which were made within three years of the testator's death, had not been paid, and at the hearing of the summons it was admitted that, having regard to s. 2, sub-s. 1 (*c*), and s. 9, sub-s. 1, of the Finance Act, 1894 (57 & 58 Vict. c. 30), the funds settled in 1912, inasmuch as they did not pass to the executors as such or at all, must be primarily borne by those funds.

The executors and trustees took out an originating summons raising the following questions:—(1.) Whether the estate duty pay-

able in respect of the property settled in 1912 ought to be paid out of that property or out of the testator's residuary estate; (2.) if the duty was to be paid out of that settled property, whether Mrs. Engledue and Mrs. Holt, in accounting for that property under the hotchpot clause, were entitled to deduct the estate duty payable in respect of it, or were to be charged with the value of the whole property settled; (3.) whether for the purpose of the hotchpot clause the settled property was to be valued at the date of the settlement thereof or at the testator's death; and (4.) whether for the purpose of distribution of the income of the residuary estate, pending its division, the income of the settled property ought to be brought into account, or interest on its value at 4 per cent.

F. Baden Fuller, for the plaintiffs, stated the facts and the questions involved.

Percy F. Wheeler, for J. P. Crocker, R. T. Crocker, and Madeline S. T. Blyth. The question as to how the estate duty on the properties settled in 1912 is to be borne is answered by the Act itself, the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (*c*), and s. 9, sub-s. 1, of which show that the settled properties must bear their proportion of the estate duty, as they never "passed to the executor." [This was not contested by the other parties.]

In applying the hotchpot clause the two daughters must bring into account the values of the properties settled on them as at the dates of the settlements, and not as at the date of the testator's death, when the properties had diminished in value.

Warwick Draper, for the trustees of Mrs. Holt's settlement. The daughters on whom settlements were made in 1912 have only to account for the net values of the properties then settled, and if those properties have to bear the estate duty payable in respect of them, in ascertaining the amounts for which they have to account under the hotchpot clause the duty must be first deducted: *In re Beddington.* (1)

[SARGANT J. referred to *Watson* v. *Watson.* (2)]

W. M. Hunt, for Mrs. Engledue, and *C. Stafford Crossman*, for Mrs. Holt. *In re Beddington* (1), although a case of ademption, is in principle an authority clearly in favour of deducting estate duty

(1) [1900] 1 Ch. 771. (2) 33 Beav. 574.

SARGANT J. before arriving at the amounts for which the daughters have to account. As regards the question whether, apart from that, the daughters have to account for the values of the settled properties at the time of the settlement or at the time of the testator's death, we say that the latter value is to be taken. The whole principle is that of equality. *Watson* v. *Watson* (1) was not a decision with reference to a hotchpot clause, but on the rule as to satisfaction of a legacy. It was followed by Parker J. in *In re Innes* (2), but is inconsistent with the remarks of Buckley L.J. in *In re Willoughby*. (3) A hotchpot clause refers to the period of distribution, namely, the time of the testator's death, and it is then that the values of advances are to be taken. *In re Kelly's Settlement Trusts* (4) is also in our favour.

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SARGANT J. The stocks comprised in the two settlements of Mrs. Engledue on the one hand, and in the single settlement of Mrs. Holt on the other hand, produced about the same incomes from more or less the same capital values, and I need hardly say that these funds have produced an income of considerable amount between the dates of the settlements and the present time.

As regards the first question raised by the summons, there has been no real argument before me to show that the estate duty is thrown on the testator's estate. The settled property becomes liable to the estate duty under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and, by s. 9, sub-s. 1, of the same Act, "a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bona fide purchaser thereof for valuable consideration without notice." Of course these settled stocks did not pass to the executors, but remained in the hands of the trustees of the settlements liable, under s. 9, sub-s. 1, to the duty which had been imposed upon them by s. 2, sub-s. 1 (*c*). In my opinion, the first question raised

(1) *Watson* v. *Watson* was followed on another point in *In re Peacock's Estate* (1872) L. R. 14 Eq. 236, 240.—F. E.

(2) (1908) 125 L. T. Journ. 60.

(3) [1911] 2 Ch. 581.

(4) [1910] 1 Ch. 78.

must be answered by saying the estate duty has to be borne and paid out of the settled properties.

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Next, I will deal with the question as to the meaning of the hotchpot clause in the will. Is the testator, when directing that the value of settled property is to be brought into account, referring to the value of the property at the time when he settled it, or to the value of the property at the time of his death? The second construction would obviously give rise to considerable difficulties, because it might well be, had the testator lived longer than he did, that the funds which he had settled had been entirely changed by the time of his death. If one had to consider the benefits which a daughter and those claiming under her actually took at the date of the testator's death, I suppose one would have to look to the value, at the date of the death, of the substituted trust funds. Now that, clearly to my mind, is not what the testator said. He says that you must look at the value of the trust funds which he had settled or would thereafter settle, and I do not think the words he used would include the trust funds which might have been substituted for the funds which he had actually settled. Yet, unless you are to give that meaning to the words, you do not really arrive at the actual benefit which the daughter and those taking under her take at the testator's death.

It is to be noticed that generally, for the purpose of satisfaction, the value of an advance has to be taken as at the time when it was made, because, although the advance is made in the shape of stocks and securities, there is no reason for differentiating such an advance from an advance in the shape of money. That was decided in *Watson* v. *Watson*. (1) It is true that the report of that case gives no account of any argument, but probably that is because the question was thought too plain for argument at that time. At any rate the persons interested in putting forward either view were before the Court, and therefore I must take *Watson* v. *Watson* (1) as an authority which is binding on me. Moreover, Mr. Crossman has kindly called my attention to the note of *In re Innes* (2), a decision of Parker J., from which it would appear that he decided in accordance with *Watson* v. *Watson*. (1) Certainly *Watson* v. *Watson* (1) has got into the text-books without any doubt being cast upon it by

(1) 33 Beav. 574. (2) 125 L. T. Journ. 60.

SARGANT J. learned authors, and the decision in it seems to be both good sense and good law. If that is so with regard to the ordinary case of satisfaction without any special provision in the will, I think the case before me is still plainer, because when the testator speaks of the value of the trust funds which he has settled or may settle, the natural meaning is that he is referring to the value of the funds when he did or should settle them. From those times respectively the trust funds passed from his dominion and passed under the dominion of the trustees of the settlements, and he had no further control of them as beneficial owner, although he did retain some control as himself a trustee of each settlement. Accordingly I declare that the values of the trust funds have to be taken as at the times when the respective settlements were made.

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Coming back to the second question—whether the two daughters who were advanced ought to be charged with the value of the settled funds subject to the liability for estate duty, which did in fact mature into an actual charge—I think the case is not distinguishable from *In re Beddington.* (1) Byrne J. in that case points out that the property comprised in the advance was at the time of the advance subject to a liability which matured, and that it was to that extent less valuable. And it is quite clear that its value was less, both as to the estate of the testator and to the estate in the hands of the recipient. I see no reason why I should differ from the decision of Byrne J. in *In re Beddington* (1), especially as it appears to be a decision which tells in favour of equality. What decision I should have arrived at without its help I need not consider. I declare that in accounting for the value of the properties comprised in the daughters' settlements the estate duty payable in respect of the settled properties ought to be deducted.

As regards income, I declare that there must be brought in interest at 4 per cent. from the death on the value of the settled properties at the time of settlement less estate duty.

Solicitors for all parties except Mrs. Engledue and Mrs. Holt: *Whitfield, Dean & Whitfield.*

Solicitors for Mrs. Engledue: *Greenip, Snell & Co.*

Solicitors for Mrs. Holt: *Monier-Williams & Co.*

(1) [1900] 1 Ch. 771.

F. E.

KINGSTON-UPON-HULL CORPORATION *v.* NORTH EASTERN RAILWAY COMPANY.

C. A. 1915

Oct. 13, 14, 20.

[1914 K. 32.]

Local Government—Sewer—Single Private Drain—Several Houses belonging to one Owner—Highway—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19—*Kingston-upon-Hull Corporation Act*, 1903 (3 *Edw.* 7, *c. ccxlvi.*), *s.* 49.

The Kingston-upon-Hull Corporation Act, 1903, by s. 49, sub-s. 1, enacts that "where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer" the corporation shall have all the powers conferred by s. 41 of the Public Health Act, 1875; by sub-s. 2 that s. 19 of the Public Health Acts Amendment Act, 1890, shall cease to be in force in the city; and by sub-s. 3 that for the purposes of this section the expression "drain" includes a "drain used for the drainage of more than one building whether owned or occupied by the same person or not." By the Public Health Act, 1875, s. 4, "drain" means "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a . . . . sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." Sect. 19 of the Public Health Acts Amendment Act, 1890, gives the local authority power to make applications under s. 41 of the Act of 1875 (relating to complaints as to nuisances from drains) where two or more houses belonging to different owners are connected with a public sewer by a single private drain.

The defendants were the owners of a plot of land within the plaintiffs' urban district abutting upon the H. Road, in which was laid a public sewer. In or about the year 1861 the defendants erected on this plot of land two rows of cottages, for occupation by their servants, with a road about twenty feet wide between them. The road was a cul-de-sac and formed the only access by road and for vehicles to the back yards of the cottages. The entrance to the road was originally closed by gates, but these were removed between 1865 and 1870 so that any member of the public might use the road, but it had never been repaired, cleansed, or lighted at the public expense.

In 1877, in consequence of a requisition by the local authority, the defendants laid a line of pipes in the centre of the road to take the drainage of the cottages, which were connected with it in pairs by means of Y-shaped pipes, into the public sewer in H. Road. The defendants subsequently constructed gullies and pipes

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whereby the surface water of the cul-de-sac road was conveyed into the line of pipes in question. The plaintiffs, purporting to act under s. 49 of the Kingston-upon-Hull Corporation Act, 1903, and s. 41 of the Public Health Act, 1875, having required the defendants to abate a nuisance in respect of the drainage of the cottages and roadway, and having executed the necessary works themselves, claimed a declaration of charge upon the property for the cost of the work in connection with the main line of pipes :—

Held, that there was not sufficient evidence of dedication to constitute the cul-de-sac a highway, but that, whether that was so or not, the line of pipes was a "single private drain" within s. 49, and that the plaintiffs were accordingly entitled to the declaration of charge which they claimed.

Decision of Sargant J. [1915] 1 Ch. 456 affirmed upon the main point, but disagreed with upon the question as to the road being a highway.

APPEAL from a decision of Sargant J. (1)

The action was brought by the plaintiffs as the urban sanitary authority within the city and county of Kingston-upon-Hull for a declaration that a sum of 91*l.* 13*s.* 9*d.*, being the amount of the expenses incurred by them in executing certain works in connection with a conduit under a roadway, together with interest at 5 per cent. thereon from April 9, 1913, was until payment thereof a charge upon certain premises of the defendants.

The question depended upon the true meaning and effect of s. 49 of the Kingston-upon-Hull Corporation Act, 1903. (2)

The facts here recapitulated in the headnote and the judgments are fully stated from Sargant J.'s written judgment in the report below. (3)

Walter Ryde, K.C., and *E. M. Konstam*, for the appellants. The case for the corporation depends upon s. 49 of the Kingston-upon-Hull Corporation Act, 1903. That section provides that s. 19 of the Public Health Acts Amendment Act, 1890, shall not apply within the city, and substitutes a section which, to state it shortly, extends the power given by the Public Health Acts Amendment Act to the corporation in cases where "two or more houses belong-

(1) [1915] 1 Ch. 456.

(2) This section together with other material sections of the Public Health Acts is set out in a note to the report of the case before Sargant J. [1915] 1 Ch. 469.

(3) [1915] 1 Ch. at p. 458.

ing to different owners are connected with a public sewer " to cases in which the houses are all owned by the same person. The local Act does not repeal the Public Health Act, 1875, and that Act defines a " drain " as any drain used for the drainage of one building only, or premises within the same curtilage. The local Act, s. 49, extends this definition to include " a drain used for the purpose of more than one building." But it does not extend it so as to include a drain which takes the drainage of land or anything except buildings. The drain in dispute in this case takes the drainage of the surface of the road, and it is therefore not within the definition of a drain in either Act, and therefore it remains a sewer as it had become before the local Act was passed.

Again, it has been decided that the powers given by s. 19 of the Act of 1890, or any local Act passed for the same purpose, only apply to a drain which the local authority could compel the owners to make under s. 41 or s. 150 of the Public Health Act, 1875 : *Wood Green Urban Council* v. *Joseph* (1) ; *Self* v. *Hove Commissioners*. (2)

The drain in question could not, at the date when it was made, have been forced upon the railway company under s. 41, for only a very few of the houses were within 100 feet of the public sewer. As soon as the drain was constructed it became a sewer, and the corporation could not afterwards force the railway company to make a sewer under s. 150, for they could not say the street was not sewered to their satisfaction when it contained a sewer vested in themselves.

The road under which this drain runs has been dedicated to the public, and there is no case in which a drain under a highway has been held to be a private drain.

For all these reasons the railway company were not bound to make the drain good.

As to the authorities. In *Bradford* v. *Eastbourne Corporation* (3) the drain was wholly in private property, and Lord Russell C.J. regards the terms " single private drain " and " sewer " as mutually exclusive.

In *Jackson* v. *Wimbledon Urban Council* (4) a drain similar in

(1) [1908] A. C. 419, 429.
(2) [1895] 1 Q. B. 685.
(3) [1896] 2 Q. B. 205.
(4) [1904] 2 K. B. 359.

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all respects to the drain in this case was held to be a sewer, and not to be made a private drain because it drained into a private drain which connected it with a sewer. *Thompson* v. *Eccles Corporation* and *Haedicke* v. *Friern Barnet Urban Council* (1) (which were heard together) were cases clearly within s. 19 of the Public Health Act, 1890, and the drains were on private ground.

The result of all the cases is that the persons alleging a drain to be a private drain within the Act of 1890 or a local Act passed for a similar purpose must prove that the drain was one which the private owner could have been compelled to make under s. 41 or s. 150.

When a local authority find a pipe laid for a number of houses and accept it as sufficient, as they have done in this case, they cannot afterwards compel the owner to make a new sewer : *Bonella* v. *Twickenham Local Board of Health.* (2) [They also referred on the question of the vesting of sewers in the local authority to *Pemsel and Wilson* v. *Tucker* (3) and *Reg.* v. *Hastings Corporation.* (4)]

P. O. Lawrence, K.C., and *R. A. Glen*, for the respondents. This line of pipes is a " single private drain " within s. 49. It was constructed by the appellants solely for the use of their own property and comes directly within the words of the section. The expression " single private drain " is explained in *Bradford* v. *Eastbourne Corporation.* (5) It is not material whether the roadway has been dedicated as a highway, but we submit that there is not sufficient evidence of any such dedication. Dedication of a cul-de-sac is very difficult to prove. *Rugby Charity Trustees* v. *Merryweather* (6) was doubted in *Woodyear* v. *Hadden.* (7) It is badly reported and has never been followed.

There are many cases in which there has been public expenditure and yet no dedication, but here there has been no public expenditure upon the road. There has moreover been no acceptance by the public, which is necessary to prove dedication.

[They were stopped by the Court upon this point.]

Walter Ryde, K.C., in reply. It is not necessary to prove repair by the local authority in order to establish dedication as a high-

(1) [1905] 1 K. B. 110.
(2) (1887) 18 Q. B. D. 577.
(3) [1907] 2 Ch. 191.
(4) [1897] 1 Q. B. 46.
(5) [1896] 2 Q. B. 205.
(6) (1790) 11 East, 375, n.
(7) (1813) 5 Taunt. 125.

way. *Rugby Charity Trustees* v. *Merryweather* (1) is not affected by *Woodyear* v. *Hadden*. (2)

As to evidence of dedication, no doubt in the case of a cul-de-sac the user by passers-by is necessarily small, but the limitation of user to a small class of persons is no answer to the suggestion of dedication. The gates and posts were removed in 1878, and there was therefore not merely acquiescence by the railway company but actual expenditure of money in the removal, which constitutes evidence of intention to dedicate the road to the use of the public.

Cur. adv. vult.

Oct. 20. LORD COZENS-HARDY M.R. Some years before 1876 the North Eastern Railway Company erected upon their own land thirty cottages in two rows. The backs of these cottages were separated by a strip of land more than twenty feet wide. Complaint being made of the want of drainage, in 1876 the local authority served notices, after which, and no doubt in consequence of which, the company laid down what has been spoken of as a red line of pipes passing down the middle of the intervening space and ending in a public sewer in Hessle Road. The cottages were drained by pipes which have been conveniently described as " Y " pipes, the leg of the " Y " conveying sewage from each pair of houses into the red line pipe. The plan given on p. 459 of the report in [1915] 1 Ch. sufficiently describes the property. As the law then stood, the legs of the " Y " pipes were " sewers " within the meaning of the Public Health Act, 1875, whereas the two arms of the " Y " were " drains," the former therefore vesting in the local authority, but the arms not so vesting. The red line pipe, as it seems to me, was exactly in the same position as the legs of the " Y " pipes. In 1890 an Act of Parliament was passed which did not affect this property, because it only dealt with the case where two or more houses belonging to different owners were connected with a public sewer by a single private drain. It had no operation in a case like this where there was only one owner. In 1903 a local Act was passed for Hull. By s. 49 of that Act s. 19 of the Act of 1890 ceased to be in force within the city of Hull. The red line drain being in a condition requiring

(1) 11 East, 375, n. (2) 5 Taunt. 125.

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repair and partial reconstruction, the corporation, acting under s. 49 of the Act of 1903 and s. 41 of the Act of 1875, did the requisite work and now claim to be repaid by the railway company. The question which arises for decision is this, whether the red line pipe is a " single private drain " within the meaning of s. 49, and in my opinion Sargant J. was right in holding that it is.

First of all I think it convenient to consider whether the space between the backs of the houses, though never repaired by the local authority, has been so dedicated to the public as to constitute it a highway. In my opinion the evidence does not establish such a dedication. It is a cul-de-sac. It leads only to the back gates of these houses. Nobody except the company and their tenants can use it or require to use it. Originally there was a gate at the Hessle Road end, and boys used to get coppers for opening it. In or about 1878 the gate was taken down, or fell down, and it has not been replaced, but this circumstance seems to me to be altogether inadequate to establish a public right of way in this cul-de-sac.

In these circumstances the red line pipe was laid by the North Eastern Railway Company in their own private property and for the sole use of their tenants. It seems to me that it is a single private drain, within the meaning of s. 49, which conveys the drainage of the houses into the public sewer in Hessle Road. In my opinion it is plain that the word " drain " is not used in s. 49 in the technical sense of the definition in the Act of 1875. I decline to interpret s. 49 by reference to the very different language in s. 19. The words inserted in s. 49 are " house or premises." Those words are much wider than the word " house " in s. 19. It seems to me that they include the case of a house with land belonging to the same owner though not within the curtilage of the house.

The view which I have expressed is substantially the same as Sargant J. expressed, except on one point. He thought the evidence sufficed to establish a dedication of the cul-de-sac to the public. Had I agreed with him on this point my conclusion would not have been affected. But the circumstance that the public have no right over this cul-de-sac renders it more easy to hold that the red line pipe is not a " public sewer," but is a " private drain."

The appeal must be dismissed with costs.

BANKES L.J. The question raised by this appeal is whether a certain line of pipes used to convey the drainage from certain property of the appellants is a single private drain within the meaning of s. 49 of the Hull Corporation Act, 1903. Attention has frequently been called to the unsatisfactory state of the statute law and of the decisions relating to the duties and liabilities of persons and public bodies with regard to sewers and drains situate within the jurisdiction of local authorities, and the present is another instance of the difficulty of applying the law to the facts of any particular case.

Under the Public Health Act, 1875, the duty was cast upon local authorities of keeping in repair and good condition all sewers within their area; and sewers were defined as including all drains except a drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. Under this state of the law an extensive obligation was cast upon local authorities in cases of nuisance arising from drains (using that word in its ordinary sense) which were in their nature private drains, and from which the public derived no benefit, and had no right to use. It was to remedy this state of things, or, as Collins M.R. puts it in *Thompson* v. *Eccles Corporation* (1), to throw back upon the private owner under certain conditions an obligation which had been upon the local authority, that s. 19 of the Public Health Acts Amendment Act, 1890, was passed. The way in which this was proposed to be done by this section was by applying the provisions of s. 41 of the Public Health Act, 1875, to a new subject-matter. Sect. 41 is the section which gave the local authorities powers of inspection where a nuisance was alleged to exist from a drain on or belonging to any premises within their district, and of compelling the owner or occupier of the premises to remedy the nuisance if it existed. Sect. 19 of the Act of 1890 extends the provisions of s. 41 to a case where the alleged nuisance arises from a single private drain connecting two or more houses belonging to different owners with a public sewer, and enables the local authority to recover the

(1) [1905] 1 K. B. 122.

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expenses of any necessary works from the owners of the houses. It declares also that for the purpose of the section the expression "drain" includes a drain used for the drainage of more than one building. The Act contains no definition of "single private drain" or "public sewer," and a number of cases have been before the Court upon the question of whether particular lines of pipes used for drainage purposes were or were not single private drains within the meaning of the section. Every case must depend upon its own particular circumstances. I do not think that much assistance is to be obtained by a consideration of decisions where the facts were quite different from those in the present case. One material point, however, stands out in some of the authorities to which we have been referred, namely, that none of the provisions of the Public Health Act, 1875, are repealed by the Public Health Act, 1890; consequently that if a nuisance exists a given line of pipes may for the purpose of s. 19 be treated as a single private drain, and yet it none the less remains a sewer vested in the local authority and repairable by them as such.

Down to the year 1903 s. 19 of the Act of 1890 was in operation in Hull, but in that year the Kingston-upon-Hull Corporation Act, 1903, was passed, s. 49 of which declared that s. 19 should cease to be in force in the city and substituted certain other provisions in its place. The scheme of the section is the same as that of s. 19 in that it calls in aid the powers conferred by s. 41 of the Public Health Act, 1875, and it uses the same expressions, "single private drain" and "public sewer," but it extends the powers of s. 41 to cases where the houses using the drain belong to the same owner as well as to those where the houses belong to different owners, and it includes "premises" as well as houses within its operation. Considerable argument has been addressed to us as to the meaning properly attributable to the word "premises" as used in the section. On the one hand it is said that it is mere surplusage, on the other that its widest meaning as contained in the definition clause of the Public Health Act, 1875, should be given to it. I do not agree with either view. The section is loosely drafted on this point, but, inasmuch as the expenses of doing any necessary work are recoverable under the section from the owners of the houses, I think the word "premises" should be confined to premises in the same ownership as

some one or more of the houses connected with the single private drain. This construction gives an intelligible meaning to the word "premises" and makes the two parts of the section consistent with each other. The section contrasts the single private drain with the public sewer. There may be cases in which the line of pipes in question is neither the one nor the other. On the other hand there may be cases in which it must be either the one or the other. The present case in my opinion comes within the latter class.

The facts are simple and are not in dispute. In 1861 or thereabouts the North Eastern Railway Company erected on their own property a number of dwelling-houses and buildings, and they laid out a road also on their property for the use of these houses and buildings, which were built back to back with the road between them. The road was a cul-de-sac, being entirely closed at the end furthest from the entrance. The North Eastern Railway Company have retained the ownership of all the houses and buildings. The road has never been taken over by the local authority. It was asserted, and Sargant J. has found, that the railway company had dedicated the road to the public. In the view which I take of this case it is immaterial whether that is to be taken to be so or not; but if the question were material I could not agree with the view of the learned judge on this point, as I consider the evidence quite insufficient to establish a dedication of the road to the pubilc. In the year 1876 notices were given by the local authority under s. 23 of the Public Health Act, 1875, requiring the railway company to properly drain these houses. The position was such that only about one-fourth of the entire number of the houses were situate within 100 feet of the main sewer in the adjoining street, and it was as to this limited number only that the section gave the local authority power to compel the owners to drain them into that sewer. As to the remainder the owners were compellable only to cause them to be drained into cesspools. What the railway company in fact did on receiving the second of the two notices was to lay a drain down the centre of the road into the public sewer and to connect all the houses with this drain in pairs. So matters remained until 1912, when the local authority alleged the existence of a nuisance and required the railway company to make it good. This they refused to do. Hence this action claiming the amount expended by

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the local authority in doing the necessary work. The dispute had reference only to the work done to the line of pipes laid down the centre of the road. In respect of the work done to the pipes connecting that line of pipes with the houses the railway company admitted liability and have paid the amount claimed for that work.

Under these circumstances the question for decision is whether the line of pipes down the middle of the road is a single private drain or a public sewer. Under the particular circumstances of this case, as I have already said, if it is not the latter it must be the former. On what ground can the suggestion be supported that this line of pipes is a public sewer? I cannot see any. It was originally placed in, and still is in, the soil of the railway company, and this is so whether the roadway was dedicated to the public or not. It was created to be used by, and is still used by, the houses and buildings and land all of which are the property of the railway company. No one has ever had, and no one can ever have, any right of access to the line of pipes for drainage purposes so long as the conditions remain the same as they were in 1912 when this question arose. If it be material to consider the question, it is the fact that as to part of its length the line of pipes was laid under circumstances which rendered the railway company compellable to lay it; and as to the remainder of its length it was laid by the railway company as a substitute for their statutory obligation. It is said, and truly said, that this line of pipes has always been vested in the local authority; but so, equally, have the connecting pipes which are admitted to be single private drains. No value can therefore be attributed to this fact. It was also said, and truly said, that proceedings might have been taken in the year 1876 under s. 150 of the Public Health Act, 1875, instead of under s. 23, and that if that had been done this line of pipes would have been taken over as a public sewer by the local authority, in which case the present proceedings could not have been taken, and that the matter ought to be treated as though the original proceedings had been taken under s. 150. The short answer to this point appears to me to be that the proceedings in 1876 were not taken under s. 150 and cannot therefore be regarded as though they had been so taken.

Then it is said that no case appears in the books in which the Courts have held a line of pipes in a public roadway to be a single

private drain. The answer to that point seems to be that the particular question appears never to have come up for decision.

The same facts which have led me to the conclusion that this line of pipes is not a public sewer convince me that it is a single private drain within the meaning of the section. In my opinion it fulfils all the essentials of such a drain in that it is single, it is private, it is connected with two or more houses or premises all belonging to the North Eastern Railway Company, and it does convey their drainage into a public sewer. A point was made that this line of pipes could not be a single private drain because it received the surface water from the roadway as well as the drainage from the houses. If my interpretation of the expression "premises" is correct it is an answer to this point. But apart from that I do not see why the introduction of other matter into a line of pipes in addition to the drainage from the houses in question should make any difference, unless the matter introduced is of such a character as to destroy the private nature of the drain.

In my opinion the appeal fails.

WARRINGTON L.J. The question in this case is whether a certain line of pipes conveying the drainage of a number of houses belonging to the North Eastern Railway Company is a private drain within the meaning of s. 49 of the Kingston-upon-Hull Corporation Act, 1903. It is conceded that if it is, the plaintiffs, the corporation, are entitled to recover from the defendants, the North Eastern Railway Company, the costs incurred by them in abating a nuisance caused by the condition of the line of pipes. Sargant J. has decided in the plaintiffs' favour.

North of Hessle Road, within the plaintiffs' urban district, is a plot of land belonging to the North Eastern Railway Company. Some time in the sixties of the last century the company erected on this plot of land two rows of cottages for occupation by their servants with a road about 20 feet wide between them. The road is a cul-de-sac.

In or about 1877 the company constructed the line of pipes in question to take the drainage of the cottages into the sewer in the Hessle Road. This was done in consequence of a requisition served upon them by the then local authority requiring them to drain into

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the sewer such of the cottages as were within 100 feet thereof and to drain the remainder into cesspools. It was not of course a strict compliance with the requisition, but it was no doubt done by the company and accepted by the local authority as being on the whole more convenient than the plan mentioned in the requisition, the carrying out of which could alone have been enforced. The cottages were drained in pairs; from each pair a pipe led into the line of pipes in question, and with this pipe was connected the house drain from each cottage. The system therefore consisted of a series of Y-shaped pipes connecting the houses with the line of pipes in question, that line of pipes conveying the drainage into the sewer in Hessle Road. At a subsequent date certain gullies with short lines of pipes therefrom were constructed whereby the surface water of the road was conveyed into the line of pipes.

Under the Public Health Act, 1875, there is no doubt that the line of pipes in question and the feet of the Y-shaped drains are sewers vested in the local authority and repairable by them, but the question depends, not on the Public Health Act, 1875, but on the local Act to which I have referred. Sect. 49 of that Act, so far as is material, is as follows: "Where two or more houses or premises are connected with a single private drain which conveys their drainage into a public sewer the corporation shall have all the powers conferred by section 41 of the Public Health Act, 1875, and the corporation may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such proportions as shall be settled by the surveyor or (in case of dispute) by arbitration under the Public Health Act, 1875"; and, "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building whether owned or occupied by the same person or not." The houses are connected with the line of pipes which conveys their drainage into a public sewer, and the only question is, is the line of pipes a private drain? It is clear that in this section the word "drain" has not the technical meaning given to it by the definition contained in the Public Health Act, 1875, first, because the line of pipes is not used only for the drainage of one building, and, secondly, because the technical meaning is excluded by sub-s. 3. The line of pipes, therefore, though used for

more than one building, is a drain within the meaning of the section. Is it a " private drain " ? It was constructed by the North Eastern Railway Company on their own land for the drainage of their own houses and no others, and it cannot in fact be used for the drainage of any other houses without their consent. These facts seem to me to afford an answer to the question and to establish that the line of pipes is a private drain. It has been contended that this cannot be the correct view, because the line of pipes, being a sewer within the definition contained in the Public Health Act, 1875, is vested in the corporation. A complete answer to this contention seems to me to be that if it were supported the section would be inoperative inasmuch as every drain used for more than one house is a sewer.

Then it is said that it is not a private drain because it receives the drainage of the road : the answer is that the soil of the road is still private property.

It is in my view immaterial whether the road has been dedicated to the public or not, but if I had to decide that question I should agree that there is no sufficient evidence of dedication.

I agree that the appeal fails.

Solicitors : *R. F. Dunnell ; Sharpe, Pritchard & Co., for H. A. Learoyd, Hull.*

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C. A.
Oct. 22.

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[1914 W. 2834.]

Landlord and Tenant—Licensed Premises—Lease in 1909*—Covenant to insure Licence in a fixed Sum—Ambit of Covenant—Non-renewal for Redundancy—Risk excluded from Policy—Statutory Compensation—Indemnity—Licensing Act,* 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 2, 3; *Scheds. I., II.—Licensing* (*Consolidation*) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *ss.* 18—21; *Sched. III.*

The lease of a public-house in 1909 (i.e., four years after the compensation system of compulsory insurance under the Licensing Act, 1904, came into operation) contained covenants by the lessees against acts endangering the renewal of the licence, and a covenant to insure the licence in the sum of 650*l.* in the joint names of the lessor and lessees, and in the event of it being lost or forfeited to pay the lessor all moneys received under the insurance.

The lessees insured the licence, but the policy did not cover non-renewal for redundancy.

Renewal having been refused for redundancy, the lessor sued on the covenant:—

Held by the Court of Appeal, affirming the decision of Astbury J., on the construction of the lease and especially having regard to the compulsory system of statutory insurance in force at the date thereof, that the lessees were only bound to insure against loss or forfeiture caused by their own acts, and not against the risk of non-renewal for redundancy.

Williams v. *Lassell and Sharman* (1906) 22 Times L. R. 443 distinguished.

Held, also, by Astbury J., that the covenant was only an indemnity covenant, so that even if it had included the risk of non-renewal for redundancy the lessor could only have recovered the amount of loss (if any) not covered by the statutory compensation.

WITNESS ACTION.

On September 28, 1903, the plaintiff purchased the Black's Head Inn, Abbots Bromley, Stafford, for 1000*l.*

By a lease dated July 21, 1909, the plaintiff demised the inn to the defendants for seven years from July 22, 1909, at a rent of 30*l.*

The defendants covenanted (inter alia) that they or their under-tenant would at all times during the continuance of the said term when necessary "apply for and use their best endeavours to obtain the necessary licences or renewal of licences for opening and keeping

open the said premises during the said term as a tavern and public-house duly licensed " and should not " do any act whereby the said licences may be or become liable to be forfeited or suspended or the renewal thereof refused or whereby the said trade or business or the goodwill thereof may in any way be or become liable to be prejudicially affected, or commit any offence against the laws for the time being in force relating to licensed houses," it being expressly agreed that any conviction of the defendants or their undertenants for any offence against " the Licensing Acts for the time being in force " should be conclusive evidence of a breach of this present covenant, and would use the said premises during the said term as a tavern or licensed victualling house only and for no other purpose, and also would at the end or sooner determination of the said term upon demand by the plaintiff or incoming tenant deliver up and assign the then existing licences to the plaintiff or his nominees, and also would at all times during the said term " insure and keep insured the licence (or licences) attached to the said premises with the Law Guarantee Trust and Accident Society Limited or some other respectable office to be approved of by the " plaintiff " in the sum of 650*l.*" in the joint names of the plaintiff and defendants, and would produce the policy and last receipt for the premium when required, and " in the event of the said licence or licences being lost or forfeited during the said term " would pay or cause to be paid unto the plaintiff " all moneys received under or by virtue of such insurance," and upon payment of all moneys received under or by virtue of the insurance of the said licence or licences in accordance with the previous covenant the defendants should have the option of determining the demise at any time thereafter by giving the plaintiff one calendar month's previous notice in writing, but without prejudice to any claim of the plaintiff in respect of any breach of the defendants' covenants.

After provisions for distress and re-entry and covenants by the plaintiff for quiet enjoyment and insurance against fire the lease provided that if the licensing authority for the time being should during the continuance of the demise refuse to renew the licence or any of the licences in respect of the said premises and should state the reason or reasons for so refusing and the reason or one of the reasons should not be misconduct on the part of the defendants or

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their undertenant and there should be no breach of any of the covenants on the part of the defendants therein contained, then it should be lawful for the defendants to determine the demise upon giving to the plaintiff one calendar month's previous notice in writing.

On January 31, 1910, the defendants sent in a "brewers' licence insurance proposal" to the Ocean Accident and Guarantee Corporation applying for a policy of 650*l.* on the plaintiff's interest in the licence and a policy of 150*l.* on their own interest.

On December 23, 1910, the 650*l.* policy was duly issued in the joint names of the plaintiff and defendants. The premium was 16*s.* 3*d.* The policy provided that if the licence should be "forfeited or refused renewal by the licensing justices or other authority" the corporation would pay or make good to the insured all loss that the insured might sustain by the depreciation in value of the interest of the insured in the premises "by the forfeiture of or the refusal to renew the said licence" to an amount not exceeding the sum of 650*l.*, "Provided always that if the insured shall be entitled to obtain the payment of compensation under the provisions of any Act of Parliament in respect to the refusal to renew the said licence, no claim shall arise under this policy."

On July 14, 1913, the defendants finding that the house was doing very little trade reduced the policy to 100*l.* at a premium of 2*s.* 6*d.* The plaintiff was not aware of the terms of the policy or of the above reduction. He had often asked to see the policy, but it had not been produced.

On February 11, 1914, the general annual licensing meeting was held at Uttoxeter. The undertenant applied for a renewal of the licence, but the application stood over to the adjourned meeting of February 25.

On February 12, 1914, the superintendent of police gave the undertenant notice of opposition on the ground of redundancy.

On February 14, 1914, the defendants apprised the plaintiff of the proposed opposition which, owing to the trivial trade, they thought would be successful, and on February 16 the plaintiff again asked to see the policy.

On February 17, 1914, the defendants for the first time informed

the plaintiff that the policy did not cover non-renewal on the ground of redundancy, and said that both he and they would have to look for compensation from the compensation authority. The policy was not in fact produced till after discovery.

At the adjourned meeting of February 25, 1914, the question of renewal was referred to the compensation authority, and on July 29 the renewal was refused on the ground of redundancy, whereupon compensation became payable.

On July 30, 1914, the plaintiff pointed out that any compensation to be obtained from the compensation authority would be quite insufficient to meet his loss. He submitted that the defendants were bound by their covenant to insure against non-renewal for any reason including redundancy, and he claimed 650*l.* damages for breach of covenant.

The defendants did not admit the plaintiff's construction of the covenant, or the amount of damages.

On September 7, 1914, a meeting was held at which without prejudice to the plaintiff's claim on the covenant the plaintiff and defendants settled a form of claim for compensation.

The claim for compensation dated September 9, 1914, was shortly as follows :—

Annual trade at 10 years' purchase . . .	£116
Rental value 30*l.* at 17 years' purchase . .	510
Depreciation of trade fixtures	30
	656
Less value of premises unlicensed; 9*l.* at 17 years' purchase	153
Total claim .	£503

The claim was signed by the plaintiff, the defendants, and their undertenant who held from them under a tied agreement at 15*l.* a year.

A footnote to the claim stated that the tied rent was 15*l.*, and it will be observed that by adding the trade due to the tie to the 30*l.* untied rent the claim was pro tanto redundant, and if the 15*l.* tied rent had been inserted instead of the 30*l.* untied rent the claim would have amounted to 248*l.*

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On September 15, 1914, the plaintiff and defendants, after considerable discussion with the clerk to the compensation authority, agreed to accept 260*l.*, and on October 7 the compensation authority awarded that amount, giving 230*l.* to the plaintiff, 20*l.* to the defendants, and 10*l.* to the undertenant. The defendants did not terminate the lease, which was still subsisting.

On October 31, 1914, the compensation authority gave the plaintiff, defendants, and undertenant notice that compensation would be paid on December 21 and that the licence (provisionally renewed) would therefore expire on December 28. The amounts were actually paid on December 28, 1914.

On November 23, 1914, the plaintiff commenced this action against the defendants, claiming a declaration that the defendants had committed a breach of the covenant to insure, and damages for that breach. He claimed 650*l.* on the footing that the covenant was to insure the payment of that absolute amount; otherwise if the covenant was construed as an indemnity covenant he claimed an inquiry as to damages.

He gave evidence that the property which he had purchased for 1000*l.* in 1903 and let at 30*l.* rent in 1909 would now only fetch from 230*l.* to 250*l.* or let at 12*l.* to 13*l.* rent. He gave no evidence of the actual value of the property in 1914 prior to the withdrawal of the licence, but submitted that the above facts prima facie entitled him to an inquiry.

The defendants, who called no evidence, contended that the covenant did not include the risk of non-renewal for redundancy, and that even if it did it was merely an indemnity covenant, and the plaintiff had not shown that the compensation was inadequate so as to entitle him to an inquiry. There was no present loss of rent as the lease was still subsisting.

The action was heard before Astbury J. on July 28, 1915.

Hon. Frank Russell, K.C., and *Cecil E. Bovill*, for the plaintiff. The defendants covenanted to insure the licences in the sum of 650*l.* and in the event of their being "lost or forfeited" to pay the plaintiff "all moneys received" under that insurance. That is a covenant to insure the payment of a sum certain in the event specified, and not a mere covenant to insure an indemnity: see

Macgillivray on Insurance, p. 103. The words "all moneys received" are merely intended to protect the defendants against the insolvency of the insurance company. They do not turn the covenant into an indemnity covenant.

We are quite satisfied with the insurance company, but the policy is not in accordance with the covenant. It is only an indemnity policy, and it does not cover the risk of non-renewal for redundancy. But a licence refused for redundancy is "lost" within the meaning of the covenant, and by omitting to insure against that event the defendants have broken the covenant: *Williams* v. *Lassell and Sharman*. (1) [They also referred to Paterson's Licensing Acts, 25th ed. p. 153.]

The reference to the Licensing Acts for the time being and the final proviso authorizing the defendants to terminate the lease if the licences are refused on grounds not including misconduct clearly show that refusal for redundancy was in the contemplation of the parties. The plaintiff is therefore entitled to payment of 650*l*.

Suppose, however, that the covenant only pointed to an insurance by way of indemnity. The plaintiff is then entitled to the difference in value of his licensed and unlicensed house. The 230*l*. awarded by the compensation authority is quite inadequate and does not conclude the matter. The plaintiff has given sufficient evidence to entitle him to an inquiry.

Micklem, K.C., and *Harman*, for the defendants. Except in the case of beer-houses the renewal of a licence was in the absolute discretion of the justices and redundancy was a good ground of refusal: *Sharp* v. *Wakefield*. (2) If, therefore, as in *Williams* v. *Lassell and Sharman* (1), the lease had been made before January 1, 1905, when the Licensing Act, 1904, came into operation, there might have been some ground for the plaintiff's contention that we ought to have insured against non-renewal for redundancy. But this lease must be read and construed with reference to the law existing in 1909, at which time there was statutory compensation for non-renewal in such a ground. This compensation is provided by means of a compulsory statutory insurance, the premiums on which are apportioned between landlord and tenant. See the Licensing Act, 1904, ss. 1, 2, 3; Scheds. I., II.; now replaced by

(1) 22 Times L. R. 443. (2) [1891] A. C. 173.

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the Licensing (Consolidation) Act, 1910, ss. 18—21; Sched. III. With this statutory insurance in their mind, it is scarcely conceivable that the plaintiff and defendants contemplated a second insurance on the same event. The covenants immediately preceding the insurance covenant are limited to the defendants' acts, and the insurance covenant should be similarly limited. The proviso at the end of the lease giving the defendants power to determine the lease if the licences are refused on grounds other than their default is of no assistance on the question of construction. We therefore submit that risk of non-renewal for redundancy is not within the covenant at all.

Suppose, however, that the covenant in fact included the risk of non-renewal for redundancy. It is in terms a covenant to insure a thing, namely, the licence. That is only a covenant for indemnity as in fire insurance: *Sadlers Company* v. *Badcock*. (1) The defendants are to pay the plaintiff not 650*l*., but the moneys received under the insurance. That again points to indemnity. Unless this is so the plaintiff would be entitled to keep the 650*l*. and obtain compensation as well. This was obviously not the intention of the parties. If the policy had followed the exact words of the covenant the insurance company would only have been liable for indemnity and could have recovered any overpayment: *Castellain* v. *Preston*. (2) The amount payable would have been assessed in just the same way as the statutory compensation, i.e., according to the rule in *In re the Crown, Cobham* (3), and the same result would have been arrived at.

The actual claim for compensation was obviously wrong. If it is amended by inserting the 15*l*. tied rent instead of the 30*l*. untied rent the amount becomes 248*l*., which is less than the 260*l*. awarded and accepted. The fact that the plaintiff gave 1000*l*. for the property in 1903 is no guide to its value in 1914. The only question is what effect the non-renewal of the licence had on the latter value.

There is no satisfactory evidence that the plaintiff's loss exceeded 230*l*., and no case for an inquiry.

Hon. Frank Russell, K.C., in reply.

(1) (1743) 2 Atk. 554. (2) (1883) 11 Q. B. D. 380.
(3) [1906] 2 K. B. 754, 764.

ASTBURY J. (after stating the facts). The two questions are, first, whether, on the true meaning of this lease, non-renewal on the ground of redundancy was one of the risks covenanted to be insured against; and, secondly, if such be the case, whether the covenant is to insure the absolute payment of 650*l.*; or, on the other hand, whether it is not an ordinary covenant for indemnity.

In the latter event the plaintiff asks for an inquiry as to damages, but the defendants contend that although the claim to the compensation authorities was settled and sent in without prejudice to the plaintiff's claim on the covenant, the subsequent agreement to accept the 260*l.* precludes the plaintiff from obtaining any relief on the footing of indemnity, as the measure of damages under the statute would, on that footing, be the same as the measure of damages under the covenant, there being no additional damages in respect of the lease, which is still subsisting.

The first question depends on whether, on the construction of this lease, the event of the licence being lost as distinct from forfeited includes loss by non-renewal for redundancy.

In *Williams* v. *Lassell and Sharman* (1) a lease of a public-house in 1898 contained a proviso that if the licensing authority should for any cause whatsoever refuse to renew the licence the lease should determine, but this proviso should have no force or validity unless and until the lessees had insured the premises in accordance with the covenant thereinafter contained. This proviso was followed immediately by the lessees' covenant to insure the licence against loss or forfeiture in the sum of 400*l.* at least, and in the event of the licence being indorsed, lost, or forfeited, to pay the moneys received under the policy to the lessor, or so much thereof as represented the damage or depreciation sustained by him in consequence of the indorsement, loss, or forfeiture. The lessees at first insured against all risks, but after 1903 they excluded the risk of non-renewal for redundancy. The licence was subsequently refused renewal on that ground. Lord Alverstone C.J. said (1): "The first question raised is whether there was any breach of the covenant by the lessees and whether, under the circumstances above mentioned, this action can be maintained. The question is one of considerable difficulty, not covered by any authority; but upon the whole,

(1) 22 Times L. R. 443.

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after the best consideration I can give to the matter, it seems to me that the plaintiffs are entitled to sue. The meaning of the words 'loss' and 'forfeiture' in this lease must be gathered from the terms of the lease as a whole." He then read the proviso and covenant and continued: "It seems to me that, although the clause is not very artistically framed, the fair meaning of it is that the covenant of the lessee should be co-extensive with the preceding clause, or, in other words, an insurance against the risks and causes which are to entitle him to be freed from future obligation under his deed." He then pointed out that the refusal to renew a licence for any cause was popularly called a loss of the licence, and he came to the conclusion that the word "loss" in the covenant before him included non-renewal on the ground of redundancy.

Now at the date of the lease in that case the compensation provisions under the Licensing Act, 1904, had not come into force, and on the whole I have come to the conclusion that the view of Lord Alverstone (1) does not apply to the present case.

In the present case there was a complete system of compensation in force at the date of the lease in the event of non-renewal for redundancy; there are covenants by the lessees against endangering the licence by their acts, and, immediately after, the insurance covenant provides that they will insure the licence in the sum of 650*l*., and in the event of the licence being lost or forfeited will pay the insurance moneys to the plaintiff.

Now up to this point there is no mention or reference in the lease to loss by non-renewal for redundancy, although it is alluded to in the proviso at the end of the lease, and on the whole, although the matter is by no means free from doubt or difficulty, I think that on the true construction of the lease, and especially having regard to the fact that at the date of the lease the plaintiff and defendants both had to pay their quota to the compensation fund, which was in fact an insurance fund against this very risk of non-renewal for redundancy, this covenant ought to be limited to the loss or forfeiture of the licence by some act or omission on the part of the defendants or their undertenant.

The parties must obviously be taken to have made this contract with a knowledge of the Licensing Act, 1904, because the Licensing

(1) 22 Times L. R. 443.

Acts for the time being are referred to in the lease, and I do not think that it is reasonable to construe this covenant as meaning that there is to be a double insurance in the event of non-renewal for redundancy.

Again the subject-matter of the insurance is the licence, in other words, the value of the licence, assuming for the moment that it is an indemnity insurance. The Licensing Act, 1904, provides that in cases of non-renewal for redundancy the difference between the value of the premises licensed and unlicensed is to be paid as compensation. If this is an indemnity covenant, that would be the exact measure of liability under the insurance, and I cannot think that the intention of the parties was that there should be a double provision for the identical amount.

If I am right in holding that the covenant does not include the risk of non-renewal for redundancy, there is an end of the action, but I will just say one word on the second point.

In my judgment, this is a covenant for indemnity and not a covenant to insure the payment of an absolute sum of 650*l*. Of course parties, if they choose, can covenant to insure the payment of a definite sum on the happening of an event, or they can covenant to insure property. Prima facie, in the latter case a covenant for insurance is by way of indemnity, and not for a fixed sum. In this case the defendants covenanted to insure the licence in a sum named, which seems to me to differ very little from the ordinary covenant to insure against fire in a named sum, and on the true construction of this covenant I think it points to an indemnity insurance. That being so, if I am wrong on the first point, and if a non-renewal for redundancy is included in this covenant, then there would have been a breach of the covenant, the damages for which, in my judgment, would be measured in precisely the same way as the amount of compensation under the Act; and the only question then would be whether the plaintiff has proved sufficient to enable him to ask for an inquiry as to damages in this event. It is not necessary in the circumstances for me to consider this, but on the whole I think the plaintiff's evidence would have been just sufficient to enable him to take an inquiry as to damages at his own risk, although, having regard to the way in which the compensation claim was arranged and the proper measure of compensation under

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the Act, I should think it is extremely doubtful whether the inquiry would result in much profit to the plaintiff.

In the circumstances I decide the case on the first point, and the result is that the action fails.

G. R. A.

C. A.

The plaintiff appealed. The appeal was heard on October 22, 1915.

Hon. Frank Russell, K.C., and *Cecil E. Bovill* repeated the arguments used by them in the Court below.

Micklem, K.C., and *Harman*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. In this case a lease was granted by the plaintiff, the freeholder of licensed premises, to the defendant brewery company for a term which will expire next year. It contained covenants by the defendants and also by the plaintiff with reference to the licensed house. I will read those in detail later, but will first state the material facts.

In 1914 the licence of this house was not renewed on the ground of redundancy, that is to say, not required by the necessities of the neighbourhood—not in any way in consequence of misconduct on the part of the lessee, or of unfitness in the state of the premises; but the licence was not renewed, and that entitled all the parties interested in the public-house to compensation from the compensation authority, and the amount of that compensation has been ascertained by consent, the consent being without prejudice to the question raised in this action. Under that arrangement the plaintiff, the freeholder, got 230*l.* and the defendants 20*l.* The question before us is whether under the covenants in this lease the defendants are liable in damages to the amount of 650*l.* for a breach of the covenant, which I must read. [The Master of the Rolls read the covenants by the lessor and the lessees contained in the lease, and continued:]

Now the parties in this case plainly contemplated, with full knowledge, that the renewal of the licence might be refused without any misconduct on the part of the tenant or any inadequacy of the premises.

The first point, and the point on which the learned judge decided this case, is this, that the covenant to insure the licence does not at all apply to a case where it is not renewed simply on the ground of redundancy. I agree with that view. I think that is the true effect of it. The opposite view is a most extraordinary one. At the date of this lease there was in force a statutory provision under which, in the event of non-renewal without misconduct, compensation is to be paid by the compensation authority for the full value of the freeholder's interest in the premises, and it is startling to the last degree to be told that this covenant to insure in the sum of 650*l.* means, as Mr. Russell has been bound to contend, that the landlord shall be entitled to claim 650*l.* in addition to that which the statutory body, the compensation authority, has held to be the value of his interest in the premises. One might be forced to that conclusion if there were a context such as there was in the case before the Lord Chief Justice of *Williams* v. *Lassell and Sharman* (1); but, in the absence of any context, or any words which may be explanatory, I think the true view is that the covenant does not contemplate non-renewal for redundancy.

In the absence of any further context the words "lost or forfeited" do not meet this case. "Forfeited" plainly does not. "Forfeited" is used in the sense that the tenant shall not do anything to forfeit the licence, and "lost" may mean lost by reason of the state of the premises. "Lost or forfeited" does not seem to me to meet the case of non-renewal on the ground of redundancy. Mr. Russell, no doubt for reasons good in the interests of his client, says that this is not an indemnity covenant at all, but simply that the sum of 650*l.* was provided against the loss of the licence; it has nothing to do with the loss he has sustained; but, alternatively, he says, if it is an indemnity covenant then there ought to be an inquiry because he is not concluded by the value which the compensation authority put on the licence. If he were right on the first point as to the construction of this covenant we might have to consider more carefully that contention, but in the view the learned judge took, and in which I agree, I think the defendants are not liable in the events which have happened for any damages under this covenant.

(1) 22 Times L. R. 443.

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BANKES L.J. I agree. The question we have to decide is, what is the proper construction of the covenant in this lease entered into by the lessees that they will take out a policy in some approved society for the sum of 650*l.* in the joint names of the lessor and lessees. The covenant to insure does not indicate, so far as I am aware, what the risks to be insured against are. They are to be gathered only from what follows, and what follows is that "in the event of the said licence or licences being lost or forfeited during the said term will pay or cause to be paid unto the lessor all moneys received under or by virtue of such insurance." Reading the covenant as a whole, the policy must at least cover the risk of loss or forfeiture of the licence or licences. Now what is meant by "lost or forfeited"? It is quite clear it is a vague expression, and you must consider it by reference to the context. Mr. Russell argued that this is a covenant to insure for a fixed and definite sum payable on a given event. I think that probably he is right, and if he is right, it seems to me conclusive of the case against him, because, if this be the fact, it is impossible to my mind to conceive that the loss or forfeiture which the parties contemplated, and about which they were contracting, was any other than a loss or forfeiture against which a policy for a fixed sum was an appropriate protection. In the particular events which happened this licence was not renewed on the ground of redundancy, which gave the parties a right to compensation; and the compensation ought to be, under the Act, the full difference of the value of the house with the licence and its value without the licence; which means that the full value of the licence should be paid to the parties interested. If Mr. Russell's contention were right, it would be to the direct interest of the lessor to go to some proper person and suggest that his house should be referred, and do all he could to have it referred, because if that were the true construction of the covenant he would be in the happy position of receiving full compensation money and also the 650*l.*, which, apparently, is more than the full value of the licence. I cannot believe that the parties contemplated anything so absurd, and I think the words are not appropriate to include or prescribe the particular risk which in fact resulted in the licence not being renewed. It is also said that the covenant is a contract of indemnity. But again, in my opinion, taking the lease as a whole,

it is obvious that this particular event of a reference for compensation was not in contemplation at all, because in the proviso which follows the lessor's covenant we find this event referred to. When the parties intended to refer to it they did so, and when they did not intend to refer to it they said nothing. I think, therefore, the appeal fails.

WARRINGTON L.J. I agree. The tenants, the lessees in this case, covenanted during the term to insure and keep insured the licence of this house in the sum of 650*l.*, and they further covenanted, in the event of the licence or licences being lost or forfeited during the term, that they would pay, or cause to be paid, unto the lessor all moneys received under or by virtue of such insurance. The second branch of the covenant seems to me to indicate that, when the parties were talking about insuring, the risks they meant to insure against were the events mentioned in the second part of the covenant, that is to say, against loss or forfeiture. In fact, the renewal of the licence has been refused on the ground of redundancy, and all the parties interested have, under the statute of 1904, received out of the compensation fund the full value of the licence by way of compensation for its non-renewal. In my opinion, under those circumstances, the expression "lost" does not apply to what has happened to the licence in question. It seems to me that a licence can hardly be said to be lost when what has really taken place is that it has been surrendered, compulsorily if you like, in consideration of its full value, for that is really what happens under the Act of 1904. But the case does not rest there. If Mr. Russell's argument be sound, that this is an insurance for a lump sum of 650*l.* in case the licence is, amongst other things, not renewed on the ground of redundancy, then we must impute to the parties this most extraordinary intention, namely, that they intended to insure this licence twice over—first, by contributing to the compensation fund out of which they are to receive the full value of it, and, secondly, by effecting the policy which will give to the lessor, and to him alone, the 650*l.* in addition to the full value of the licence. It seems to me that that is an intention which it is impossible to impute to the parties. But, even supposing that this were only an insurance for an indemnity, there still remains the question whether "lost" includes non-

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renewal under such circumstances. I have already expressed my opinion on that, but will only on this point take the opportunity of saying that that view is strengthened by the reference in the proviso to one of the landlord's covenants to a loss or non-renewal for some reason other than misconduct by the tenant.

I would only add one word as to the case before the Lord Chief Justice of *Williams* v. *Lassell and Sharman*. (1) In that case the Lord Chief Justice, on the construction of that particular lease, came to the conclusion that "lost" included non-renewal for redundancy, and I think his judgment is founded not only on the particular expressions contained in the covenant, but also as explained by the context. Not only that, but he points out what is perfectly true, namely, that at the date when the lease was executed the justices had power to refuse to renew a licence on the ground of redundancy, and, if they exercised that power which they then possessed, there would have been no compensation, and, in that case, the licence may very well be said to have been lost if the justices had refused to renew on that ground. I agree, therefore, in thinking that the learned judge was right.

Solicitors: *Gibson & Weldon, for Francis G. Robinson, Ilkeston; Sharpe, Pritchard & Co., for H. Russell & Son, Lichfield.*

(1) 22 Times L. R. 443.

G. A. S.

ARLIDGE *v.* METROPOLITAN BOROUGH OF HAMPSTEAD.

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NEVILLE J.
July 23, 30.
C. A.
Oct. 28.

[1915 A. 927.]

Local Government—Housing Acts—Unsanitary Dwelling—Long Lease at Peppercorn Rent—Unoccupied Premises—Closing Order—Service on "every Owner"—Name and Address of Lessor not known—Service at the Premises "after diligent inquiries"—Service of Closing Order—Service of Notice of Closing Order—Housing of the Working Classes Act, 1890 (53 *&* 54 *Vict. c.* 70), *ss.* 49, 86—*Housing, Town Planning, &c., Act,* 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 18, 47, 49, 51, 76.

Sects. 32 and 33 of the Housing of the Working Classes Act, 1890 (called the principal Act), which provide for the making of closing orders and demolition orders in respect of an unsanitary dwelling, are repealed by the Housing, Town Planning, &c., Act, 1909, and are re-enacted with amendments by ss. 17 and 18 in Part I. of the latter Act, and s. 76 of that Act provides that Part I. is to be construed as one with the principal Act and another Act, which may be cited as the Housing Acts, 1890 to 1909.

By s. 17, sub-s. 3, of the Act of 1909 "notice of a closing order shall be forthwith served on every owner of the dwelling-house in respect of which it is made, and any owner aggrieved by the order" may appeal to the Local Government Board within fourteen days "after the order is served upon him."

By s. 49 of the Act of 1890 notice of a closing order is to be served on the owner by giving it to him, or for him to some inmate of his residence or place of business in the district; but where the owner of the dwelling-house or his residence or place of business is not known to, and after diligent inquiry cannot be found by, the local authority, then the clerk of the local authority may serve the notice by leaving it, addressed to the owner, with some occupier of the dwelling-house.

The plaintiff was the assignee of a ninety-nine years' lease at a peppercorn rent of a dwelling-house in respect of which the defendants made a closing order. On February 21, 1911, they served a copy of the order on the plaintiff, and on the same day they, having failed (as they alleged) after diligent inquiries to ascertain the name and address of the freeholder of the premises, caused a sealed copy of the order addressed to "the owner" to be left with a woman at the premises, which at this time were unlet and were in the occupation of a caretaker for the plaintiff.

In an action by the plaintiff against the defendants for a declaration that the closing order had not become operative and for an injunction to restrain them from proceeding under the order, the plaintiff moved for an interim injunction on the ground that the defendants had not made diligent inquiries for the name and address

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of the freeholder, and that the order had not been served on the freeholder, nor had any notice of the order been served on him personally :—

Held, on the evidence, that the defendants had made diligent inquiries for the name and address of the freeholder, and that in this respect the service was good.

Held, also, that no distinction was drawn in the Acts between service of an order and service of notice of an order, and that what in fact had been served was both the order and notice of the order.

Decision of Neville J. affirmed.

MOTION.

This application raised the question whether a closing order had become operative in the following circumstances.

The plaintiff was the assignee of the lease of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead, granted for a term of ninety-nine years from September 29, 1869, by a deed dated September 17, 1869, except the last day of such term.

On January 12, 1911, the defendants, acting under sub-s. 2 of s. 17 of the Housing, Town Planning, &c., Act, 1909, made a closing order in the usual form in respect of the dwelling-house, and on February 21, 1911, served a copy of the order on the plaintiff personally. At this time the dwelling-house was unlet and was in the occupation of a caretaker for the plaintiff, and on February 21, 1911, the defendants also caused a sealed copy of the order to be left with a woman at the dwelling-house, and this copy ultimately came to the hands of the plaintiff.

On March 7, 1911, the plaintiff appealed against the closing order to the Local Government Board on the ground that the house was not unfit for habitation, and the Board, after holding an inquiry, by an order dated July 29, 1911, dismissed the appeal. The plaintiff then instituted proceedings in the High Court to quash the order of the Board, and the litigation that ensued was carried to the House of Lords, who by an order dated July 20, 1914, affirmed the order of the Board : see *Local Government Board* v. *Arlidge*. (1) Meanwhile the plaintiff, having from time to time made some repairs at the premises, on two occasions applied to the defendants to determine

(1) [1915] A. C. 120.

the closing order, but both applications were refused. The second application was refused on May 16, 1912, and an appeal against this refusal to the Local Government Board was dismissed by them on March 22, 1915.

Between May 16, 1912, and March 22, 1915, the plaintiff, having carried out considerable further repairs on the premises, made a third application on March 29, 1915, to the defendants to determine the closing order, and this application was still pending. On June 11, 1915, the defendants served the plaintiff with a notice that on July 13 they would proceed to consider his pending application and also the question of the demolition of the premises. Thereupon the plaintiff commenced this action claiming (1.) a declaration that the closing order dated January 12, 1911, had not become operative; and (2.) an injunction to restrain the defendants from proceeding to enforce that order. The plaintiff now moved for an interlocutory order.

The plaintiff alleged that the closing order had not been served on the freeholder of the premises, nor had any notice of the closing order been served on him personally; that diligent inquiries had never been made by or on behalf of the defendants to ascertain the residence or place of business of the freeholder; that his (the plaintiff's) title deeds were registered in the Middlesex Registry; that the defendants knew that he was the lessee; and that a search against his name would have enabled them to discover the owner of the freehold and other persons interested.

The defendants' evidence was that immediately upon the making of the closing order they caused diligent inquiries to be made in order to find the freeholder or other persons who were "owners" of the dwelling-house within the meaning of that term as defined by s. 49, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909, but up to the date of the service of notice of the closing order upon the plaintiff they were unable to find the freeholder or any owner, or the residence or place of business of the freeholder or any owner, of the dwelling-house other than the plaintiff; that the inquiries made were (*a*) verbal inquiries of the owners and occupiers of the premises adjoining the dwelling-house, (*b*) careful search of the file of drainage applications kept by the defendants, (*c*) search of the returns made in 1905 in respect of the dwelling-house pursuant

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to s. 55 of the Valuation (Metropolis) Act, 1869, for the purposes of the quinquennial revaluation of property under that Act; and that, in order to secure that every owner should be served with a notice of the closing order, the defendants on the same day that such notice was served on the plaintiff caused a sealed copy thereof addressed to "The owner" to be left with the occupier of the dwelling-house as required by s. 49, sub-s. 2, of the Housing of the Working Classes Act, 1890. It also appeared that after the service of their notices the defendants renewed their inquiries and on March 15, 1911, applied to the plaintiff for the name and address of the freeholder. The plaintiff declined to give any information, but subsequently stated in his evidence on the inquiry held by the Local Government Board that he did not know who was the freeholder. The defendants also made inquiries, without result, of the auctioneers who sold the house to the plaintiff, and caused search to be made in the Register of London Freeholders compiled by the London County Council. None of these searches yielded any result, but in March, 1915, the defendants ascertained that Donald Nicoll was at some period the freeholder of the property, and they at once instituted a search in the Middlesex Register in his name, which disclosed that Donald Nicoll mortgaged the freehold in 1870, that the mortgage afterwards became vested in Currey and White, that Currey died about 1883; but no subsequent dealings with the freehold could be traced.

The motion came on for hearing before Neville J. on July 23, 1915.

Jenkins, K.C., and *R. H. Hodge*, for the plaintiff. The closing order has not become operative for two reasons. In the first place there has been no proper service of the order or of notice of the order on any person except the plaintiff. Under ss. 32 and 33 of the Act of 1890 a local authority could not make a closing order without going to a Court of summary jurisdiction, but those sections have been repealed and are reproduced with amendments in ss. 17 and 18 of the Act of 1909, under which a local authority can now make a closing order itself, and by ss. 47, 51, and 76 of that Act the provisions of the two Acts relating to the housing of the working classes are to be read together. By s. 17, sub-s. 3, of the Act of 1909 "notice of a closing order" is to be served on "every

owner" of the property, and any owner aggrieved can appeal to the Local Government Board within fourteen days after "the order is served upon him," and s. 49 of that Act defines an "owner" to include every lessee and mortgagee. The provisions as to service of notice of a closing order are in s. 49 of the Act of 1890, and s. 86 of that Act points to a distinction between an order and a notice. By s. 49 of the Act of 1890 notice of a closing order is to be served personally, but if the owner after diligent inquiry cannot be found then the local authority may serve the notice by leaving it, addressed to "the owner," with some occupier of the premises. Leaving a sealed copy of the order with some person on the premises is not service of a notice of a closing order on the occupier within the Acts. Arlidge's assignment recites the grant of the lease by Donald Nicoll to Bannister at a peppercorn rent in consideration of the erection of three houses, one of which is the premises in question. Then Bannister mortgaged the house less one day to the plaintiff's predecessors in title, and Nicoll also mortgaged, so that at the date of the closing order the parties interested in the property were (1.) the plaintiff; (2.) the person in whom the outstanding one day is vested; (3.) the person or persons in whom the freehold reversion is vested. No point is made with respect to the outstanding one day, because Bannister's mortgage contains the usual declaration by the mortgagor to hold the last day of the term in trust for the mortgagee and his assigns; but it is submitted that, apart from diligent inquiry, notice of the closing order has not been served on every owner, and therefore the order has not become operative. But if we are wrong on the first point, then we say that on the evidence the defendants have not discharged the onus of diligent inquiry. At the time of the service of the order no sufficient inquiry had been made for the freeholder. Arlidge's title is registered in the Middlesex Registry, and if they had searched under his name and obtained inspection of his assignment they would have ascertained that Donald Nicoll was the freeholder and could have obtained all the information they now have. At any rate the defendants ought not to proceed under the order, but matters should be kept in statu quo until the trial of the action.

Peterson, K.C., and *Sydney Turner*, for the defendants, were not called upon.

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NEVILLE J. This is a short point which can be decided by the Court as well on motion as at the trial. I do not see that at the trial we should know anything which we do not know at the present time. It is a point not without difficulty owing to the slipshod manner in which the section of the Act has been drawn. The question is whether the closing order has become operative—in other words, whether there has been a sufficient service of notice of the order on every owner of the dwelling-house. It is not disputed that Arlidge had notice, but it is said that there are other owners on whom notice of the order has not been served. Whoever the owner of the freehold may be, there is somebody who now represents the interest of Donald Nicoll, who was the original reversioner on the determination of the ninety-nine years' lease. To deal with that point first, I think the owner, by whom I mean the person in whom the estate of Donald Nicoll is now vested, was not known to the local authority and could not be found after diligent inquiry. The question then arises whether the service, which I think was in that respect perfectly good under s. 49 of the Act of 1900, was a good notice under sub-s. 3 of s. 17 of the Act of 1909, which says, "Notice of a closing order shall be forthwith served on every owner of the dwelling-house in respect of which it is made, and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the order is served upon him." In my opinion it is not intended by the words of that section to draw any distinction between notice of the order and the order itself. I do not see how you can serve notice of the order without serving the order, because the notice must at all events show the substance of the order. As a matter of fact what was served here was in my opinion both the order and the notice of the order, and that, it seems to me, brings the case within s. 49. I therefore make no order upon the motion.

H. L. F.

C. A. The plaintiff appealed. The appeal was heard on October 28, 1915.

Jenkins, K.C., *Brooke Little*, and *R. H. Hodge*, for the appellant, repeated the arguments which were presented in favour of the

plaintiff in the Court below, and cited in addition the case of *Rayner* v. *Stepney Corporation*. (1)

Peterson, K.C., and *Sydney Turner*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. In this case I think the order of Neville J. and his reasons for making the same were quite right. The appeal will be dismissed.

BANKES L.J. I agree.

WARRINGTON L.J. I agree.

Solicitors: *Rubinstein, Nash & Co.; A. P. Johnson.*

G. A. S.

In re BACKHOUSE.
SALMON *v.* BACKHOUSE.

[1915 B. 1904.]

Will—Construction—Legacy—Conditions as to Priority—Codicil—Substituted settled Legacy.

Testator by his will bequeathed an annuity to his wife during her widowhood and several legacies in favour of his children, including a legacy of 1000*l.* to his son Robert on attaining the age of twenty-five years, and a legacy of 2000*l.* to his son Basil on attaining the same age. The will contained a proviso that if the testator's estate should be insufficient for all the payments directed, the legacies in favour of his children should abate proportionately, and that the annuity bequeathed by his will and "any other legacy or annuity given by any codicil" thereto should be paid in priority. By a second codicil the testator bequeathed to Robert, in addition to the bequests in his favour contained in the will, the sum of 1000*l.* subject to and after payment of the legacies and the annuity bequeathed by the will. By a fourth codicil the testator revoked the legacy bequeathed by the will to Basil, and "in lieu and stead thereof" bequeathed to him a legacy of 1000*l.* on attaining the age of thirty-five years, and in the event of his death under that age settled the same on trusts in favour of Basil and his children. By a fifth codicil the testator revoked the legacy bequeathed by

(1) [1911] 2 Ch. 312.

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the fourth codicil to Basil and the trusts relating thereto, and "in lieu and stead thereof" bequeathed to his trustees the sum of 1000*l.* upon trusts under which Basil took a protected life interest, with remainder in favour of his children and issue. The testator's estate was insufficient to pay all the legacies in full :—

Held, that the additional legacy given to Robert by the second codicil was postponed to the other legacies.

Held, also, that the substituted legacy given by the fifth codicil in favour of Basil, his children and issue, was not according to the true construction of the will and codicils entitled to any priority under the proviso contained in the will, but was payable pari passu with the other legacies.

The general rule of construction, that prima facie a substituted legacy is subject to the same conditions as the original legacy, is not confined to cases where the only change introduced is one of amount, but may sometimes apply to cases where the legatee under the substituted gift is a different person from the original legatee.

Leacroft v. *Maynard* (1791) 1 Ves. Jun. 279 ; 3 Bro. C. C. 233, followed.

In re Joseph [1908] 2 Ch. 507 distinguished.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment :—By his will dated March 10, 1910, the testator bequeathed to his son Robert a legacy of 1000*l.* on his attaining the age of twenty-five years, and to each of his sons St. John, Basil, and Hugh a legacy of 2000*l.* on their respectively attaining the age of twenty-five years, and after usual directions for the sale and conversion of his real and personal estate and the payment of funeral and testamentary expenses and debts and legacies bequeathed by his will or any codicil and death duties, the testator directed his trustees to invest the residue of the proceeds of sale and conversion and to stand possessed thereof and of the investments for the time being representing the same (thereinafter called the trust fund), upon trust to pay his wife 200*l.* a year during widowhood, with power to appropriate investments for that purpose. And subject to this appropriation the testator directed his trustees to set aside from the trust fund a sum of 16,000*l.* which he settled in sums of 5500*l.*, 5500*l.*, and 5000*l.* each upon his three daughters Myrtle, Ursula, and Ethel ; and the testator directed his trustees to hold the residue of the trust fund in trust for his daughters and sons and for children of deceased daughters and sons as therein mentioned ; and after provision for payment of all death duties on the benefits given by his

will or any codicil the testator made the following provision, namely: "Provided always and I further declare that, if the moneys to arise from the sale and conversion hereby directed or otherwise forming part of my estate shall not be sufficient to pay my funeral and testamentary expenses and debts and the annuity and legacies hereby bequeathed, then the following legacies hereby given to my said children, namely, the sum of 1000*l.* to my son Robert, the sum of 2000*l.* to each of my said sons St. John, Basil and Hugh, and the sums of 16,000*l.* (the several sums of 5500*l.*, 5500*l.* and 5000*l.* abating proportionately) for my said daughters Myrtle, Ursula, and Ethel, shall abate proportionately, and the annuity given by this my will and any other legacy or annuity given by any codicil hereto shall be paid in priority to the said legacies last specifically above mentioned."

By a first codicil dated September 13, 1910, to the will the testator revoked every bequest in his will to his son George, and further he reduced the sum of 16,000*l.* directed to be set aside for his daughters to the sum of 15,500*l.* divided into three sums of 5500*l.*, 5000*l.*, and 5000*l.*

By a second codicil, dated June 7, 1911, to the will the testator provided amongst other things as follows, namely: "I bequeath to my son Robert in addition to the bequests in his favour contained in my said will the sum of 1000*l.* subject to and after payment of all funeral and testamentary expenses and debts and all the legacies and the annuity bequeathed by my said will and all the duties thereby directed to be paid, and also after setting aside the sum mentioned in the said previous codicil thereto, but before my residuary estate shall be divided between the respective persons entitled thereto."

By a fourth codicil, dated April 17, 1913, to his will the testator provided as follows, namely: "Whereas by my said will I have bequeathed to my son Basil Backhouse the legacy or sum of 2000*l.* as and when he shall attain the age of twenty-five years, Now I hereby revoke the said legacy of 2000*l.* to my son Basil and in lieu and stead thereof I give to my said son Basil the legacy or sum of 1000*l.* as and when he shall attain the age of thirty-five years"; and in the event of his son Basil being under the age of thirty-five years the testator made provision for the payment of the income of the legacy to Basil till he attained that age, and also made provision

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that in the event of Basil subsequently dying under the age of thirty-five years the legacy should be held for his children as therein particularly set out.

By a fifth codicil, dated May 21, 1913, to his will the testator, after referring to the provisions made by the fourth codicil, proceeded as follows: "Now I hereby revoke the bequest of the said legacy or sum of 1000*l.* to my said son Basil by my said fourth codicil and all the provisions therein contained with reference to such legacy or sum, and in lieu and stead thereof I bequeath to my trustees the sum of 1000*l.* free of duty upon trust to invest the same in any mode of investment authorised by the said will with the power to vary such investments from time to time, and (*sic*) shall stand possessed of the said sum and the investments for the time being representing the same (hereinafter called 'the trust legacy') upon" the trusts thereinafter declared, being trusts under which Basil took a determinable life interest only, and on determination the income was during the residue of his life to be applicable for the benefit of him and his issue at the discretion of the trustees, and so far as not so applied was to go as if Basil were dead; and after the death of Basil the capital was to be held for his children and issue as therein provided.

Each codicil to the testator's will contained words of general confirmation of his testamentary dispositions to date except as thereby altered.

The testator died on December 8, 1913, leaving him surviving his widow and the four sons and three daughters provided for by his will and codicils. His son Basil was at the date of the death in his twenty-second year. It appears that, after paying debts and funeral and testamentary expenses and setting aside a sufficient fund to meet the widow's annuity, there will be available out of the estate a sum of some 17,000*l.* to 18,000*l.* only as against the legacies to the three daughters, amounting together to 15,500*l.*, and the legacies to or in favour of his four sons, amounting together to 7000*l.* Some abatement must therefore take place as to all or some of these legacies, and the questions are (1.) whether the legacy under the fifth codicil in favour of Basil Backhouse and his issue has priority over the legacies to the other children or ranks pari passu with them; and (2.) whether the additional legacy of 1000*l.*

given to Robert Backhouse by the second codicil is postponed to the legacies to the other children or ranks pari passu with them.

J. D. Israel for the summons.

J. F. W. Galbraith, for Basil and an infant child of Basil. The legacy given by the fifth codicil is entitled to priority. It falls within the description of " any other legacy or annuity given by any codicil hereto " to which priority is expressly given by the proviso contained in the will. The judgments of Cozens-Hardy M.R. and Farwell L.J. in *In re Joseph* (1) show that the general rule that a substituted legacy is subject to the same conditions as the legacy for which it is substituted has no application to a case where the beneficiaries named in the codicil are not identical with the beneficiaries named in the will. Here the absolute interest given to Basil by the will, partially reduced by the fourth codicil, is further reduced to a very precarious interest by the fifth codicil. New beneficiaries are introduced, and the case falls directly within the observations of Cozens-Hardy M.R. and Farwell L.J. in *In re Joseph.* (1) See, too, per Fletcher Moulton L.J. in *In re Boden.* (2) The limitations of the general rule are further pointed out in *Chatteris* v. *Young* (3), *Mann* v. *Fuller* (4), *In re Mores' Trust* (5), and Jarman on Wills, 6th ed. p. 1130.

L. W. Byrne for Robert.

W. M. Hunt, for the other children of the testator, was only called on to argue the first question raised by the summons. The legacy bequeathed in favour of Basil and his children and issue by the fifth codicil is expressed to be " in lieu and stead " of the legacy bequeathed by the fourth codicil, which in its turn was expressed to be " in lieu and stead " of the legacy bequeathed by the will. On the true construction of all the instruments therefore it is plain that the latest legacy was intended to be in substitution for the legacy originally given by the will and does not fall within the description of " any other legacy or annuity given by any codicil hereto " within the meaning of the proviso contained in the will.

[SARGANT J. My difficulty arises from the wide language of the judgments in *In re Joseph.* (1)]

(1) [1908] 2 Ch. 507.
(2) [1907] 1 Ch. 132, 149.
(3) (1827) 2 Russ. 183.
(4) (1854) Kay, 624.
(5) (1851) 10 Hare, 171.

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The question is one of the testator's intention to be gathered from the instruments as a whole, and there is nothing in *In re Joseph* (1) which compels the Court to come to a conclusion contrary to that intention.

Cur. adv. vult.

Nov. 11. SARGANT J. delivered the following written judgment :— The questions here are as to the order of priority of two legacies, namely, (1.) a legacy of 1000*l.* given by the fifth codicil to the testator's will for the benefit of the defendant Basil Backhouse and his issue, and (2.) an additional legacy of 1000*l.* given by the second codicil to the testator's will to the defendant Robert Backhouse. Both questions depend on the effect of the testator's will as modified or added to by subsequent testamentary dispositions. [His Lordship stated the facts as above set out, and continued :]

The second question raised by the summons is the easier of the two, and I will dispose of it first. Any inference that an additional legacy is to be on the same terms as an original legacy is of course an inference that yields to and is displaced by any express language to the contrary. Now here the terms of the second codicil are in my opinion clear and unambiguous and expressly provide that this additional legacy to Robert is to rank subject to and after providing for the legacies given by the will to him and the other children. Accordingly I declare that this additional legacy is so postponed.

The first question raised by the summons depends not on express direction, but on inference. But nevertheless I cannot entertain any real doubt as to the result. The general rule is thus stated in Vaughan Hawkins on Wills, 2nd ed. p. 358, namely : " An added or substituted legacy is, prima facie, payable out of the same funds and subject to the same incidents and conditions as the original legacy " ; and the first case cited in support of that statement is the leading case of *Leacroft* v. *Maynard*. (2) In that case the testator by his will gave his real estate upon trust to sell and apply the produce as follows, namely, to pay to certain persons 300*l.* each at twenty-one, to pay the trustees 50*l.* each, to pay the Foundling Hospital 2000*l.* and the hospitals of Leicester and Stafford 1000*l.* each, and the surplus to such charitable uses as the Lord Chancellor

(1) [1908] 2 Ch. 507. (2) 1 Ves. Jun. 279 ; 3 Bro. C. C. 233.

on petition should direct. Afterwards by a codicil he revoked the legacy to one of the trustees and substituted in his place another trustee, to whom he gave the same legacy of 50*l*. In the same codicil he revoked the legacies to the Foundling Hospital and the hospitals of Leicester and Stafford and gave 1500*l*. to the Foundling Hospital, 500*l*. to the infirmary of Nottingham, and a sum to be distributed among the poor of the parish of S.

The decision was that the charitable legacies to the new charitable legatees as well as to the Foundling Hospital were void as coming out of real estate. The report of the judgment in Brown's Chancery Cases (1) is this: "The Lord Chancellor said he thought that the codicil only meant to alter the quantum of the legacies in some cases, and the objects of them in others, but not the fund out of which they were to be paid; and that, therefore, the legacy to the hospital in the county of N."—one of the substituted legacies to a fresh legatee—"was void." In the report of the judgment in Vesey Junior the Lord Chancellor says (2): "You must also contend, that the legacy of 50*l*. given to the new trustee, substituted in the place of him removed, shall come out of the personal estate. I think it is pushing it too far"—a remark indicating that the matter was even plainer in the case of the substituted legacy to the new trustee appointed by the codicil.

It will be observed that in *Leacroft* v. *Maynard* (3) the substituted legacies with regard to which the question arose were legacies to fresh legatees, and not, as is more ordinarily the case, legacies to existing legatees. And I mention this fact because some general observations by the present Master of the Rolls and by Farwell L.J. in *In re Joseph* (4) were urged on me as authority for the proposition that the general rule only applied to substituted or additional legacies to existing legatees. I doubt whether the observations were intended to have quite the wide general effect attributed to them or to apply at all to general conditions affecting a legacy as a whole as distinguished from conditions regulating the respective interests of successive takers. But in any case *Leacroft* v. *Maynard* (3) was not mentioned in the judgments in *In re Joseph* (4) and was entirely consistent with the actual decision in that case. And it is, I think,

(1) 3 Bro. C. C. 233.
(2) 1 Ves. Jun. 280.
(3) 1 Ves. Jun. 279; 3 Bro. C. C. 233.
(4) [1908] 2 Ch. 507.

SARGANT J. 1915 BACKHOUSE, *In re.* SALMON *v.* BACKHOUSE.

clear that the Master of the Rolls and Farwell L.J. had no intention whatever of dissenting from or questioning *Leacroft* v. *Maynard.* (1)

If then the general rule above stated as to substituted legacies may sometimes apply to cases where the legatee under the substituted gift is a different person from the original legatee, the present case is in my judgment one to which the general rule is particularly applicable, and is indeed more readily applicable than in *Leacroft* v. *Maynard.* (1) So far as the fourth codicil is concerned there is but a small change as regards the legatee, the son taking at thirty-five only instead of at twenty-five and certain trusts being introduced in favour of his issue which are naturally incident to this change. And again the change introduced by the fifth codicil, though more considerable than that made by the fourth codicil, is a change in the same direction, and is obviously made merely by way of additional protection to the legatee and his family and for the purpose of ensuring a personal and inalienable enjoyment of the fund. Further, the language of each codicil seems to me to indicate an intention to fit the substituted legacy into the same position in the framework of the will as the original legacy and to be entirely inconsistent with any intention (such as was manifested in the second codicil) to place the new legacy in a new place in order of priority. And lastly the language of both the fourth and the fifth codicils is such as to render it difficult to say that the substituted legacy under either codicil brings it within those words of the will which are needed to give it priority, namely, the words "any *other* legacy or annuity given by any codicil hereto." As regards this legacy, therefore, I declare that it ranks pari passu with the legacies given by the will to the other children of the testator.

Solicitors: *Oliver Richards & Parker.*

(1) 1 Ves. Jun. 279; 3 Bro. C. C. 233.

A. C.

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* ROSSE.

C. A. 1915 *Oct.* 21 22.

[1914 F. 1342.]

Inclosure Act—Lords of the Manor—Commons and Wastes—Underlying Minerals—Compensation to Lords of Manor for "right to the soil"—Allotments in Fee Simple—Preamble—Distinction between "soil" and "mines and minerals"—Saving Clause—Whether Minerals reserved—Norton Inclosure Act, 1814 (54 *Geo.* 3, *c. cxxxvi.*), *preamble; ss.* 12, 14, 17, 28, 32, 33, 66.

A special Inclosure Act, which incorporated the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), recited that the plaintiffs, as lords of the manor, were "owners of the soil of the commons and wastes within the manor, and of the mines and minerals therein," and directed that a certain portion of the commons and wastes should be allotted to the plaintiffs as lords of the manor as a full compensation for "their right to the soil of the said commons and wastes," and that the residue of the commons and wastes should be allotted to and amongst persons having right of common on the commons and wastes, and provided that all parties should hold their respective allotments in severalty freed and discharged from all rights of common; and by a saving clause the rights of all persons were saved except "the several persons, bodies politic and corporate, to whom any allotment or other compensation shall be made or provided by virtue of this Act, in respect of the interest or property for which such allotment or compensation shall be made," and except such other rights and interests as the inclosure thereby authorized required to be barred, destroyed, or extinguished. Excepting the preamble the Act and the award were silent as to mines and minerals:—

Held, that throughout the Act the word "soil" was used not in its widest sense, but in the restricted sense of the surface of the land, and that the allottees of the commons and wastes, other than the lords, took an estate in fee simple only in the surface of their allotments, the underlying mines and minerals being reserved to the lords.

Decision of Eve J., following that of Neville J. in *St. Catharine's College, Cambridge* v. *Greensmith* [1912] 2 Ch. 280, affirmed.

APPEAL from a decision of Eve J.

The Act 54 Geo. 3, c. cxxxvi., was passed "for inclosing lands in the manors or townships of Campsall, Norton, and Askern, in the county of York." After reciting (inter alia) that there were

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within the manor or township of Norton in the parish of Campsall aforesaid open and common fields, commons, wastes, and other commonable lands which contained together by estimation 1600 acres or thereabouts, and that the Master and Fellows of St. Catharine's College, Cambridge, in right of the college, " are lords of the manor of Norton aforesaid, and as such are owners of the soil of the commons and waste grounds within that township, and of the mines and minerals therein," and that the Master and Fellows of St. Catharine's College aforesaid and divers other persons were owners and proprietors of lands and grounds in the open common fields and meadows within the aforesaid several and respective townships, and reciting the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), and that the lands and grounds of the respective proprietors in the said open and common fields and meadows lay much intermixed and dispersed in small parcels and were inconveniently situate for occupation, and the same and also the commons, wastes, and other commonable lands and grounds in the said several townships were, " in their present state, incapable of any considerable improvement; and it would be of great benefit and advantage to all persons interested therein respectively, if all the said open common fields . . . . commons, wastes and other commonable lands and grounds, within each of the aforesaid respective townships, were divided and inclosed, and specific parts thereof allotted to the several proprietors thereof and persons interested therein respectively, in each respective township in proportion to their respective rights and interests " in manner thereinafter directed, the Act appointed commissioners to carry it and the recited Act into execution " except such parts of the said recited Act as are hereby altered or varied, and under and subject to such of the regulations and restrictions contained in the said recited Act as are not repugnant to the provisions of this Act."

Sect. 12 enacted that when the division and allotment of the said commons and wastes and open fields had been ascertained and established by the award of the commissioners " all rights of common or average of what nature or kind soever " to which the same were then subject should absolutely cease and be extinguished.

Sect. 13 empowered the commissioners to suspend or extinguish rights of common until the allotments were made.

Sect. 14 enacted that all encroachments which should have been made upon the said commons and wastes within twenty years last before January 1, 1813, should be deemed part of the said commons and wastes to be inclosed and allotted by virtue of the Act without regard to the value of any erections thereon or improvements made thereto; provided that in all cases when any such encroachments should have been made, and the person or persons who were in possession or receipt of the rents thereof were not entitled to any allotment of the said commons and wastes, the commissioners might award or allot such encroachments to the person or persons who at the time of making such allotments should be in possession or receipt of the rents of such encroachments, "they paying the price or value of the lands, to be set upon them by the said commissioners, without any regard had to the value of any erections thereon, or improvements made thereto; and they shall, from and after the execution of the said award, be discharged from all rents which may have been set upon them by the lord of the manor where the same are situate, and shall for ever after be held as freehold in fee simple."

By s. 17 the commissioners were authorized to allot one or more pieces of ground, not exceeding in the whole four acres, within and for the use of the said manors as and for public stone quarries for the purpose of digging and getting stone and other material for the making and repairing of the highways to be set out and appointed over the said open fields, commons, and wastes thereby directed to be divided, inclosed, and allotted, and "the soil and surface of the lands and grounds to be set out for public stone quarries aforesaid" should after the execution of the award of the commissioners be vested in the surveyor of the highways for the time being within the township wherein such quarries should be situate.

Sect. 28 enacted that the commissioners should allot and award unto the Master and Fellows of St. Catharine's College, as lords of the manor of Norton, such part and parcel of the remainder of the wastes and commons within the manor of Norton "as (quantity, quality, and situation considered) shall in their judgment be equal to one full eighteenth part in value thereof, in lieu of and as full and sufficient recompence for their right to the soil" of the said commons and wastes.

Sect. 32 enacted that one moiety in value of the residue of the

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commons and wastes within the manor of Norton should be allotted and awarded amongst the several and respective owners and proprietors of messuages, cottages, and tofts within the same manor, having in respect thereof right of common on the said commons and wastes, in proportion to the number and without regarding the value of their respective messuages, cottages, or tofts, and the other moiety in value of such residue of the said commons or wastes amongst the several owners and proprietors of any lands or grounds whatsoever, having in respect thereof rights of common on the said commons and wastes within the same manor, in proportion and according to the value of their respective lands and grounds, "in full bar and satisfaction of and for their several and respective rights and interests upon" the said commons or wastes in the same manor, "and that in ascertaining the value of the several and respective parcels of wood land or ground within the said manor or township, the said commissioners shall and they are hereby required to estimate the same according to the nature and quality of the soil thereof, as if no wood was growing thereon."

Sect. 33 enacted that the commissioners should divide, allot, and award the residue of the open fields and pastures within the manor of Norton "unto and amongst the several and respective owners and proprietors thereof, according to their several and respective lands, grounds, rights and interests therein, in such manner, shares, and proportions as the said commissioners shall in their judgment think most just and equitable, in full recompence and satisfaction for their several and respective rights and interests which they now severally and respectively have and enjoy in and upon the said open fields, ings, meadows and pastures hereby directed to be divided and inclosed, situate in the said manor or township of Norton."

Sect. 38 provided that when the commissioners should have made their award all persons and bodies corporate should accept the same within one month, and should "hold and enjoy the said respective allotments in severalty, freed and discharged of and from all claim or right of common or average whatsoever."

Sect. 55 provided that the commissioners might set out and allot parts of the said commons and wastes to raise the expenses incurred in carrying the Act into execution, and might sell and convey such

allotments to the purchaser or purchasers thereof, his or their heirs and assigns, in fee simple.

Sect. 62 provided for the making of the award and directed the commissioners to state in their award the quantity of land allotted, with the tenure and nature thereof.

Sect. 66: "Saving always . . . . to all persons, bodies politic and corporate, their respective heirs, successors, executors, administrators and assigns (other than and except the several persons, bodies politic and corporate, to whom any allotment or other compensation shall be made or provided by virtue of this Act, in respect of the interest or property for which such allotment or compensation shall be made, their respective heirs, successors, executors, administrators and assigns, and except such other rights and interests as the intent and purpose of the inclosure hereby authorized shall absolutely require to be barred, destroyed or extinguished, by virtue of this Act) all such estates, rights, title and interests, as they, every, or any of them had or enjoyed, of, in, to or out of the said commons, wastes and open fields hereby directed to be inclosed, before the passing of this Act, or could or might have had and enjoyed if this Act had not been made."

The commissioners, by their award dated February 13, 1818, after reciting (amongst other things) s. 28 of the Act, allotted and awarded to the plaintiffs "as a full compensation to them for their right and interest in and to the soil of the said commons and wastes" a parcel of land being part of the commons in Norton aforesaid containing 34 a. 1 r. 26 p., which parcel of land "is in our judgment (quantity quality and situation considered) equal in value to one eighteenth part of the remainder of the said commons and waste grounds within the manor or township of Norton aforesaid by the said recited Act directed to be divided and inclosed"; and by the award the residue of the open fields, commons, and wastes in Norton aforesaid was divided and allotted to and amongst the several owners and proprietors (including the plaintiffs) according to their several and respective rights and interests therein. And it was thereby declared that the allotments or parcels of land so awarded to the plaintiffs were "in full bar and satisfaction for all their rights and interests in the several open fields commons and waste grounds" by the Act directed to be divided and inclosed; and by the award divers parcels

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of land in Norton aforesaid were allotted and awarded to (amongst other persons) the predecessors in title of the defendants, and it was thereby declared that the several allotments so awarded to them were in full bar and satisfaction for all their rights and interests in the several open fields, commons, and wastes by the Act directed to be divided and inclosed. And it was thereby declared that all the several allotments thereinbefore awarded were of the nature or tenure of freehold and had been accepted by the several persons to whom the same were respectively allotted and awarded, their heirs, executors, administrators, successors, and assigns, and were so awarded in full of all their respective rights and interests in the several open fields, commons, and wastes by the Act directed to be divided and inclosed, and should be held and enjoyed by the respective parties or persons to whom the same were so awarded and their respective heirs, successors, and assigns according to their respective estates and interests in the lands and hereditaments in respect whereof the same were so allotted and awarded.

Except the reference to mines and minerals as recited in the preamble of the Norton Inclosure Act, that Act and the award were silent as to the mines and minerals underlying Norton Common. A large colliery had recently been started near Norton Common, and the ownership and value of the mines and minerals underlying the common came into prominence.

The plaintiffs, as lords of the manor of Norton, by this action claimed a declaration that upon the true construction of the special Act and award they were entitled to the mines and minerals under the defendants' lands.

The defendants contended that upon the true construction of the Act all the mines and minerals underlying such parts of the commons and wastes within the manor of Norton as were in pursuance of the Act and by the award allotted and awarded otherwise than to the plaintiffs as lords of the said manor became, by virtue of the Act and award, vested in the several persons to whom the same respectively were so allotted and awarded, absolutely discharged (except in the case of copyhold allotments) from all estate, right, title, interest, or claim of the lords of the manor; and that the allotments made to the predecessors in title of the defendants were allotted as freehold and that the defendants were by virtue of the Act and award seised

thereof and of the mines and minerals thereunder as parcel thereof in fee simple.

Eve J., considering that he was bound by the decision of Neville J. in *St. Catharine's College, Cambridge* v. *Greensmith* (1), held that the word " soil " was used throughout the Act, not in its widest sense, but in the restricted sense of the surface of the land, and that the commoners took an estate in fee simple only in the surface of their allotments, the mines and minerals thereunder being reserved to the plaintiffs.

The defendants appealed.

Upjohn, K.C., and *J. G. Wood*, for the appellants. The object and effect of this Inclosure Act were to allot to the lords of the manor one eighteenth part of the wastes in full satisfaction of their interest in the remainder. Under s. 14, which dealt with the encroachments upon the waste, these were to be allotted upon payment of the awarded value of the same to the persons in receipt of the rent thereof, to be held as freehold in fee simple. Again, under s. 55 the commissioners were given power to sell parts of the commons and wastes for the purpose of raising the expenses of carrying the Act into execution and to convey the same to the purchasers in fee simple. If it had been the intention of the Act that the minerals under the whole of the property should remain vested in the lords there would have been express provision in those sections for the reservation of the minerals.

This appeal, though in form an appeal from the decision of Eve J., is in truth an appeal from the decision of Neville J. in *St. Catharine's College, Cambridge* v. *Greensmith* (1), where the question now raised upon the construction of the Norton Inclosure Act, 1814, was decided adversely to the contention of the present appellants.

The Act deals not only with commons, wastes, and other commonable lands, but also with certain open and common fields which were subject to rights of inter-commonage between their respective owners. As to those the lords had no right to the minerals lying thereunder. All through the Act and the award the commons, wastes, open fields, and other commonable lands are dealt with in

(1) [1912] 2 Ch. 280.

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the same way and allotted in fee simple, no distinction being drawn that in the one case minerals are reserved and that in the other they are not. There is nothing in the Act to suggest that the commissioners are to deal with the surface alone and not with the minerals. Apart from the preamble there is no reference to mines and minerals in the Act. The preamble is not to be used to govern the construction of the Act, and, reading the Act apart from the preamble, the word "soil" must be construed as including the minerals: *Townley* v. *Gibson*. (1)

Neville J. only considered the preamble and did not have regard to the material sections of the Act. Unless there be an ambiguity in the Act itself it is not permissible to call in aid the preamble in order to construe it. You must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital: *Powell* v. *Kempton Park Racecourse Co*. (2) The Act deals with two classes of property, (1.) the common fields and (2.) the commons and wastes. In the case of the common fields the Act directs that they shall be divided and allotted amongst the several and respective owners in such proportions as the commissioners shall think fit in full recompense and satisfaction of their respective rights and interests in the same. The interest of the owners in that case is the ordinary fee simple in the whole of the land. But when the Act deals with the wastes language is used, which has become consecrated in Inclosure Acts since the time of George II., to satisfy the rights of the lord and the commoners. The portion allotted to the lords is to be "in lieu of and as a full and sufficient recompence for their right to the soil" of the said wastes, while the allotment to the commoners is to be in extinguishment of their rights of common. It is submitted that the word "soil" there includes both surface and minerals. Where there is no express or implied provision to the contrary, the word "soil" in an Inclosure Act will always be construed as including the minerals: *Townley* v. *Gibson*. (1)

[BANKES L.J. The particular point in this case did not arise in *Townley* v. *Gibson*. (2) The whole point here is whether there is a context.]

There is none in the enacting part of the Act, and even if the preamble be looked at it creates no distinction. The object

(1) (1788) 2 T. R. 701. (2) [1899] A. C. 143, 157, 185.

of the preamble was to show that all the persons competent to deal with the whole property, both surface and minerals, were parties to the agreement embodied in the Act. If the intention was not to deal with the minerals there was no necessity to refer to them in the preamble, which leads up to a dealing with the whole. There are many cases in which the minerals were reserved to the lord either expressly or by necessary implication : *Earl Rosse* v. *Wainman* (1) ; *Haigh* v. *West* (2) ; *Micklethwait* v. *Winter* (3) ; *Pretty* v. *Solly* (4) ; *Duke of Buccleuch* v. *Wakefield.* (5)

Where there is to be an express reservation of the minerals to the lord the allotment to him is generally in lieu of and in satisfaction of his right to the soil, and then there is a subsequent saving clause which excludes the minerals from the operation of the Act, showing clearly that minerals are included in the " soil."

[BANKES L.J. Is not the use in s. 28 of the expression " right to the soil " instead of " right in the soil " material ?]

The use of the different expressions might affect the nature of the right, but not the subject-matter of the right. If in s. 28 the word " land " had been used instead of the word " soil " the respondents' contention would not have been arguable. The word " soil " is perhaps more flexible in meaning. [Co. Litt. 47a was also referred to.]

Cave, K.C., MacSwinney, and *Brydges,* for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This case, although in form an appeal from Eve J., is in reality an appeal from Neville J., and it raises a question upon the construction of an Inclosure Act passed in the year 1814. The question which we have to decide is undoubtedly very important, because it affects not merely the land in which the parties to this action are interested, but also necessarily the rights of persons interested in the other two manors which the Act deals with. The question is this : whether the rights of the lords of the manor to the minerals under the waste which was allotted to the

(1) (1845) 14 M. & W. 859 ; (1848) 2 Ex. 800.
(2) [1893] 2 Q. B. 19.
(3) (1851) 6 Ex. 644.
(4) (1859) 26 Beav. 606.
(5) (1870) L. R. 4 H. L. 377.

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defendants have been extinguished or whether they still remain in being.

In dealing with an Inclosure Act, as in dealing with deeds, you must, of course, look at the whole instrument. I do not understand the argument which says you are to look at one part first and another part afterwards. You must look at the whole instrument, and it does not strike me as right to say that you must look at the section of the Act which allots to the commoners certain allotments and without looking at any other part of the Act consider whether there is any ambiguity in that section. That is not the right way, I think, to approach this question. You must look also at what is allotted to the lords; you must look also at the recitals, and generally at the whole Act, and thus arrive at the best conclusion you can as to what it was that was taken away from the lords in respect of which compensation was awarded to them by the Act, for it is quite clear under the saving clause (s. 66), which I agree is not altogether in the usual form, that except in so far as a person receives compensation under the Act he is not bound by it, but is outside it and is not in any way affected by it. The question, therefore, that we have to decide as best we can is this: what, on the true construction not merely of the preamble or of s. 28 or s. 32, but of the whole Act, are the rights which were given to the allottees of the waste in respect of their common rights, and what is not touched so far as the lords are concerned.

The Act deals with three manors, Campsall, Norton, and Askern, in Yorkshire. The one which concerns us is Norton. The Act contains a recital that the Master and Fellows of St. Catharine's College are lords of the manor of Norton aforesaid, and as such are owners of the soil of the commons and waste grounds within that township and of the mines and minerals therein. There are corresponding recitals as to the other manors. Then it is also recited that there were not merely wastes of the manor but common fields in Norton, and, I think, in the other manors too. I do not propose to go through it in detail. Common fields, as we know, are most inconvenient for cultivation; they are very different from wastes of the common. Each owner of land in common fields is an owner in fee subject only to such common rights as the owners in the common fields may have over them. It is not necessary to define

accurately what those rights were, but that is really the position. With regard to the wastes it is quite different. The soil is in the lords, and the commoners have merely certain rights over the surface. It may be that they have a right of turbary or something of the kind, but speaking generally their rights are rights over the surface, and the lord has the right in the entirety. That "soil," apart from any context or qualification to be found in the document which we have to construe, would pass everything, including minerals, I do not dispute, but it is, I think, equally clear that it is not a word which has any such fixed, definite, and final meaning as that the Court is not entitled, and indeed bound, to look at the whole Act, including the context, in the widest sense, to see whether or not there is a qualified meaning given to the word "soil." The Act also contains provisions getting rid of the tithes in all these three parishes and vesting in the various rectors allotments instead of the tithes, though that is a part of the Act which does not seem to me to have any bearing upon the question. I think that any difficulty which the commissioners had or might have had in one view of the construction is really not in point. Parliament imposed upon the commissioners a difficult task, but the difficulty was got over to everybody's satisfaction for the space of one hundred years, and the question has only recently been raised.

I now come to the sections which seem to me to be important. The first that is material is, I think, s. 33, which empowers and directs the commissioners to allot and award the common fields. It provides that the commissioners are to "divide, set out, allot and award the residue of the said open fields, ings, meadows, and pastures within the said manor or township of Norton, unto and amongst the several and respective owners and proprietors thereof, according to their several and respective lands, grounds, rights and interests therein, in such manner, shares, and proportions as the said commissioners shall in their judgment think most just and equitable, in full recompence and satisfaction for their several and respective rights and interests which they now severally and respectively have and enjoy in and upon the said open fields, ings, meadows, and pastures hereby directed to be divided and inclosed, situate in the said manor or township of Norton." As a question of construction it seems to me quite plain that there is there no reservation of the

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right to the minerals and no possible reason why there should be. Each of these owners was entitled usque ad inferos, and there was no severance of the surface and the mines; there was a clean allotment out and out of the common fields to the various owners of their intermixed portions of the field. The preceding section (s. 32) deals with the wastes. It enacts that the commissioners shall set out, allot, and award one moiety in value of the residue and remainder of the waste grounds within the manor "unto and amongst the several and respective owners and proprietors of messuages, cottages and tofts within the same manor or township, having in respect thereof right of common on the said commons and waste grounds respectively, in proportion to the number and without regarding the value of such their respective messuages, cottages, or tofts; and the other moiety or equal half-part in value of such residue and remainder of the said several and respective commons or parcels of waste ground unto and among the several and respective owners and proprietors of any lands or grounds whatsoever, having in respect thereof right of common on the said commons and waste grounds situate, lying and being within the said manor or township of Norton, in proportion and according to the value of such their respective lands and grounds, in full bar and satisfaction of and for their several and respective rights and interests upon the said several and respective commons and parcels of waste ground within the said manor or township of Norton." What is the meaning of the words "residue and remainder"? I think they have two meanings: first of all they may mean residue after taking out certain allotments to the surveyors for roads and for gravel pits, and so on, but their meaning is to be found in s. 28. Sect. 28 provides that the commissioners for the manors of Norton "shall set out, allot and award unto and for the said Master and Fellows of Catharine Hall College, as lords of the manor of Norton aforesaid, such part and parcel of the remainder of the waste grounds and commons within the manor or township of Norton aforesaid as (quantity, quality, and situation considered) shall in their judgment be equal to one full eighteenth part in value thereof, in lieu of and as a full and sufficient recompence for their right to"—what? The whole case turns upon this—"the soil of the said commons and waste grounds in the manor." There is a marked difference on the

face of these sections as to the form in which the allotment is made. In s. 28 it is made simply in "recompence for their right to the soil of the commons and waste grounds," and when I look at the recital I find there is something there which seems to be quite helpful as to the meaning of that. The recital treats the mines and minerals not as something included in the commons and waste grounds, but the recital is that St. Catharine's College are owners of the soil of the said commons and waste grounds within that township and of the mines and minerals therein. Compensation therefore is given and it seems to me is only given to St. Catharine's College for their right to the soil of the said commons and waste grounds, leaving untouched their right to the mines and minerals, which are expressly treated as something separate and distinct from, and not as included in, the soil of the wastes. That being so, I think we are bound to say, on the construction of this Act, that there is a sufficient context to justify us in holding that "soil" is not to be taken as meaning the land and everything under it, but is a word which is to be construed so as not to include the mines and minerals under the lands in respect of which compensation has been awarded. On principle that is the view which commends itself to me. Further I think there is authority which really binds us, or which is quite sufficient without more to justify us in placing upon the Act the construction which I have indicated. In the case of *Duke of Buccleuch* v. *Wakefield* (1), which came before Malins V.-C. and eventually went up to the House of Lords, there is a passage in Lord Chelmsford's judgment which is clear: "In support of the appellant's right to the mines, reliance was placed on the 24th section of the special Act, by which the lord of the manor is to have an allotment of one-sixteenth part of the moors, commons, and wastes, as a compensation for his right and interest in and to the soil of the same. It was argued that the word 'soil' was comprehensive enough to include everything to which the lord was entitled in, over, or under the moors, commons, and wastes. But whatever may be the force of this word, unqualified and unexplained, it cannot have the effect contended for as it is used in the special Act. It is, perhaps, unnecessary to go farther than to the 1st section of the Act for proof of this. It recites that 'the Duchess Dowager of Buccleuch and

(1) L. R. 4 H. L. 377, 403.

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Queensberry is lady of the manor of Plain Furness, and, as such, is entitled to the soil of all the said moors, commons, and wastes, and to all mines, minerals, and quarries, of what nature and kind soever, within or under the same.' I should have thought, as the soil and the mines are here expressly distinguished from each other, that the 24th clause, considered alone, would have been sufficient to show that the compensation to the lord was confined to his right and interest in the surface soil." Then he goes on to say that there is another clause, clause 43, which removes any shadow of doubt upon it. Lord Hatherley L.C. really takes the same view, although his language is not quite so express. This is really the view that was taken by Neville J. in his judgment in *St. Catharine's College, Cambridge* v. *Greensmith* (1), and that judgment, it seems to me, is correct on all points ; and this being in substance an appeal from that judgment, I think all we can do is to dismiss the appeal with costs.

BANKES L.J. I agree.

The question for decision is whether upon the true construction of the Inclosure Act the interest of the lord of the manor in the minerals underlying the waste passes to the allottees of the waste, I quite agree that it is necessary to consider the Act as a whole in order to arrive at its true construction, and, first of all, with regard to the scheme of the Act. The scheme of the Act seems to me to be quite plain, and I do not think there is any dispute about it. For the purpose of carrying out the proposed inclosure certain interests of the lord of the manor and the copyholders and the commoners are extinguished, and in respect of those extinguished interests they receive compensation either by way of allotment or otherwise, and those interests which were either compensated for or which the Act intended should be compensated for were extinguished, but interests for which no compensation was given or provided stood outside the Act altogether and were not dealt with by it.

We have been exhorted not to commence a consideration of the Act by looking at the preamble, and I am quite prepared to assent to that, because it seems to me if you begin an examination of the Act by considering first of all the saving clause, it is the simplest way to arrive at a definite conclusion. The saving

(1) [1912] 2 Ch. 280.

clause is the last but one in the Act. There is this noticeable fact about it, that it does not mention mines and minerals. It saves all the estates, rights, titles, and interests of all persons except the persons, bodies politic and corporate, to whom any allotment or other compensation shall have been made or provided by virtue of this Act, and, of course, the lord of the manor comes within the class of excepted persons. But it is not all the interests of that excepted class that are excepted from the saving clause, but only the interests or property for which allotment or compensation should be made. Therefore the first step is to consider for what interests or property of the lord of the manor did this Act provide that compensation should be made. In order to ascertain that it is agreed that you must look at s. 28. When you come to the language of s. 28 you find that the allotment is to be made to the lords of the manor in lieu of and as a full and sufficient recompense for their right to the soil of the said commons and waste grounds in the manor or township of Norton aforesaid. Now I did think, and I still think, that the expression " right to the soil " is a limiting form of expression. I do not say it necessarily limits, but it is a limiting form of expression, and it is remarkable that the language in other Inclosure Acts in the cases to which we have been referred is in a very different form, for in almost all those cases the allotment was expressed to be a recompense in respect of the right and interest in and to the soil. What is meant by the word " soil " ? Mr. Wood used an expression which I quite accept as to the word " soil." He said " it is a flexible expression " ; and I have been looking through the cases to see whether I can find a case which is an authority as to how far it was permissible to consider the preamble, not where there is a case of ambiguity so much as a case where a flexible expression is used, and I think I have found an authority directly in point in the case of *Salkeld* v. *Johnston* (1), where the then Lord Chancellor, when speaking of this very question as to how far it was permissible to look at the preamble, says : " I cannot find any ambiguity in this enactment, or any flexible expression capable of different meanings." This being a flexible expression, I think I may now consider the preamble, and that brings me to what seems to be the only point in the case. Is the

(1) (1849) 1 Mac. & G. 242, 264.

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preamble in this case, as counsel asks us to say, a recital of the persons interested in order to indicate to the commissioners and to anybody who has to construe this private Act of Parliament that all the parties, if I may use the expression, were before the Court; or is it an expression intended to draw a distinction between the different classes of property and interests of the lord of the manor in order that it might be subsequently made plain that the lord of the manor is to be compensated in respect of one of those interests, and that one only therefore was to be extinguished, and the other was to stand outside the Act?

Upon that I entertain no doubt at all, and if I did I should be comforted by the authorities to which we have been referred, because in the case which the Master of the Rolls has already referred to, of *Duke of Buccleuch* v. *Wakefield* (1), Lord Chelmsford, in speaking of an almost identical recital, says: "I should have thought, as the soil and the mines are here expressly distinguished from each other, that the 24th clause, considered alone, would have been sufficient to show that the compensation to the lord was confined to his right and interest in the surface soil."

Giving the matter the best consideration I can, it seems to me plain that the intention of the Legislature in inserting this preamble was to draw a distinction between the classes of property and interests of the lord so as to introduce the enactment that an allotment should be made to the lord as compensation for the one class, while the other class was to stand outside the Act. Under those circumstances the judgment of Neville J. was in my opinion right.

Warrington L.J. I am of the same opinion.

The question is whether the allotment to commoners made in pursuance of s. 32 of the Act included the minerals under the waste. In order to determine this question it is not enough merely to look at s. 32 itself, under which the particular allotment is made; you must look at other provisions of the Act, and in particular that provision which empowers the commissioners to make an allotment to the lord, and also the saving clause.

When you look at the provision for an allotment to the lord in s. 28 you find that the commissioners are to allot to the lords a

(1) L. R. 4 H. L. 377, 404.

certain proportion of the waste grounds and commons in lieu of and as a full and sufficient recompense for their right to the soil of the said commons and waste grounds in the manor or township of Norton aforesaid. The word "soil," as I think is shown clearly by the authorities, is a word of flexible meaning—that is to say, it is a word which, according to the true construction of the document in which it occurs, may mean the same thing as the word "land": it may mean the surface of the land as distinct from that which is under it.

To throw light on what is meant by the use of the word "soil" in s. 28 I turn to the saving clause, and when I do so I find that it is quite clear that there are some estates, rights, or interests of the lord and of other persons in these commons which are not to be affected by the Act, because not only in the express terms of the saving clause is there the protection of such rights, but you find that in the exception from what would otherwise be the generality of the saving clause there are excepted only those persons to whom allotment or compensation is made in "respect of the interest or property for which such allotment or compensation shall be made." It is clear, therefore, that with regard to the lord and with regard to any other allottee the effect of the Act may be to leave out some interest in the common as not affected.

So far we are left in doubt as to whether the particular estate or interest in the lord, namely, his right to the mines and minerals, is or is not amongst the interests not affected by the Act. Even according to the appellants' own contention, we are entitled to look at the preamble in order to remove the doubt which to my mind, as I have already said, so far exists. When you look at the preamble there can, I think, be no question that the framers of this Act distinguished between the right to the soil and the right of the lord, the estate of the lord, in the mines and minerals. The recital is to the effect that the College are lords of the manor of Norton, and as such are owners of the soil of the commons and waste grounds within that township and of the mines and minerals therein. "Therein," I think, quite plainly means not in the soil but in the commons and waste grounds. I think there is there a plain distinction between the right of the lords to the soil and the right of the lords to the mines and minerals.

Then going back to s. 28 it becomes quite clear that the allotment

C. A. 1915 ST. CATHARINE'S COLLEGE v. ROSSE.

there referred to is made in compensation for the first of those two rights and the first of those two rights only. If that is so, s. 32 has to be qualified by the effect of s. 28 properly construed, and the commoners do not take the mines and minerals under the common, but only a portion of the soil of the common.

I agree, therefore, that the appeal should be dismissed.

BANKES L.J. I meant to have repeated what I said in argument, that, in my opinion, the particular point which we had to decide was not really raised in *Townley* v. *Gibson*. (1)

LORD COZENS-HARDY M.R. I quite agree.

WARRINGTON L.J. I also agree.

Solicitors for appellants: *Frere, Cholmeley & Co., and Emmet & Co., for Claude Leatham & Co., Wakefield.*

Solicitors for respondents: *Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield.*

(1) 2 T. R. 701.

G. A. S.

In re ATKINSON.
ATKINSON *v.* ATKINSON.

[1915 A. 143.]

SARGANT J.
1915
Nov. 24, 25.

Will—Perpetuity—Personalty settled by Reference to Realty—Adult Tenant in Tail in Possession—Construction.

Testator gave his real and personal estate to trustees as to the personal estate upon trusts for conversion and investment and upon trust to pay the income thereof to the person (if any) who under the trusts or limitations thereinafter contained should for the time being be tenant for life of or otherwise entitled to the possession or receipt of the rents and profits of his real estate until such real estate should become vested in some person who should become adult tenant in tail thereof in possession, and from and after the happening of such last mentioned event then as to both capital and income upon trust for such last mentioned person absolutely; and as to his real estate upon trust for his brother during his life, and from and after his death upon trust for the first and every other son of his said brother successively in remainder one after another according to their respective seniorities in tail general:—

Held, that the trust of the personal estate in favour of the person who should become adult tenant in tail in possession could not be construed as applying to a tenant in tail by purchase only, and was therefore void for remoteness.

Ibbetson v. *Ibbetson* (1840) 5 My. & Cr. 26 and *Lord Dungannon* v. *Smith* (1846) 12 Cl. & F. 546 followed.

Christie v. *Gosling* (1866) L.R. 1 H. L. 279 and *Martelli* v. *Holloway* (1872) L. R. 5 H. L. 532 distinguished, and a passage in the head-note to the report of *Martelli* v. *Holloway* (L. R. 5 H. L. 532) commented on as being too widely stated.

Adjourned Summons.

Leonard Wilson Atkinson, who died in 1904, by his will, dated May 22, 1891, after making certain specific and pecuniary bequests, devised and bequeathed all the rest of his estate unto trustees as to personal estate upon trust to sell and convert the same, and after payment of his funeral and testamentary expenses and debts to invest the residue of such estate or the proceeds thereof as therein directed, "and upon trust to pay the income thereof to the person (if any) who under the trusts and limitations hereinafter contained shall for the time being be tenant for life of or otherwise entitled

SARGANT J. 1915 ATKINSON, *In re.* ATKINSON *v.* ATKINSON.

to possession or receipt of the rents and profits of my real estate until such real estate shall become vested in some person who shall be adult tenant in tail thereof in possession; and from and after the happening of such last mentioned event then as to both capital and income upon trust for such last mentioned person absolutely; and as to real estate upon trust for my brother John Atkinson during his life without impeachment of waste, and from and after his death upon trust for the first and every other son of my said brother successively in remainder one after another according to their respective seniorities in tail general," with divers limitations over.

John Atkinson died on November 29, 1914. John Edward Atkinson was his eldest son and was born on July 16, 1878. In 1907 John Edward Atkinson was appointed a trustee of the testator's will, and he was now sole surviving trustee. On June 6, 1914, he executed a settlement on his marriage which, by virtue of a covenant to settle his after-acquired property, comprised his interest (if any) under the bequest of the testator's residuary personal estate.

This was an originating summons taken out by John Edward Atkinson for the determination of the question whether the bequest in the testator's will of the residue of his personal estate failed so far as regards the gift of the corpus and income thereof in favour of the person who should be the first adult tenant in tail in possession of the real estate as infringing the rule against perpetuities. The defendants were the statutory next of kin of the testator and the trustees of the marriage settlement of John Edward Atkinson.

No question was raised as to the bequest of income prior to the death of John Atkinson.

G. N. Marcy, for the summons.

W. R. Sheldon, for the next of kin. The trust of the residuary personal estate is void for remoteness. It is subject to two conditions—first, that the person claiming under it must be tenant in tail in possession of the real estate, whether by purchase or descent, and secondly, that he must attain the age of twenty-one years. Looking to possible and not actual events, it is clear that these two conditions need not combine for an indefinite time,

and the case is directly within *Ibbetson* v. *Ibbetson* (1) and *Lord Dungannon* v. *Smith*. (2)

SARGANT J.
1915
ATKINSON, *In re.* ATKINSON *v.* ATKINSON.

W. J. Whittaker, for the trustees of the marriage settlement of John Edward Atkinson. I admit that, if the expression "tenant in tail thereof in possession" includes tenants in tail by descent, the trust is void for remoteness; but similar limitations in respect of chattels have been construed in a narrower sense as applying to tenants in tail by purchase only so as to avoid offending against the rule against perpetuities: *Christie* v. *Gosling* (3); *Martelli* v. *Holloway*. (4) The rule as stated in the head-note to the report of *Martelli* v. *Holloway* (4), that "there may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will," was quoted and adopted by Farwell L.J. in his judgment in *In re Earl of Stamford and Warrington* (5) and was acted on by the same learned judge in *In re Mortimer*. (6) See, too, Gray on Perpetuities, s. 633, 2nd ed. p. 477; 3rd ed. p. 499. I submit that in accordance with those authorities the words "tenant in tail" in this will should be construed as tenant in tail by purchase so as to give effect to the bequest.

[SARGANT J. referred to Vaizey on Settlements, pp. 1346, 1347.]

W. R. Sheldon in reply referred to *Countess of Harrington* v. *Earl of Harrington* (7) and *Pearks* v. *Moseley* (8), and distinguished *Christie* v. *Gosling* (3) and *Martelli* v. *Holloway*. (4)

SARGANT J. The question raised by this summons is whether a gift of personal estate upon trusts corresponding with trusts of real estate is void for remoteness. [His Lordship read the trusts of the testator's will above set out, and continued:] No question has been raised between the parties whether there was an effectual gift of the income of the personal estate during the life of the

(1) 5 My. & Cr. 26.
(2) 12 Cl. & F. 546.
(3) L. R. 1 H. L. 279.
(4) L. R. 5 H. L. 532.
(5) [1912] 1 Ch. 343, 365.
(6) [1905] 2 Ch. 502, 506; affirmed in the Court of Appeal [1905] 2 Ch. 511.
(7) (1871) L. R. 5 H. L. 87.
(8) (1880) 5 App. Cas. 714.

SARGANT J. 1915

ATKINSON, *In re.* ATKINSON *v.* ATKINSON.

testator's brother John Atkinson. I am only asked to decide on the validity of the gift in remainder to the first person who becomes an adult tenant in tail in possession. It was fairly admitted by Mr. Whittaker, who was supporting the limitations in the will, that, having regard to such cases as *Ibbetson* v. *Ibbetson* (1) and *Lord Dungannon* v. *Smith* (2), the limitation must be void unless I can construe the words "shall be adult tenant in tail thereof" so as to limit them to a person becoming "adult tenant in tail thereof by purchase," because otherwise it is clear that there might be a series of tenants in tail dying while their estate was in reversion and allowing the estates to descend, either through their being under the age of twenty-one years when they died or through not disentailing, to remoter issue who would not become entitled within the description in the limitation until after a period longer than that allowed by the rule against perpetuities. But Mr. Whittaker claimed the benefit of certain decisions such as *Christie* v. *Gosling* (3) and *Martelli* v. *Holloway* (4) as enabling the Court to validate the will by limiting the words "tenant in tail" to "tenant in tail by purchase." As I understand the cases of *Christie* v. *Gosling* (3) and *Martelli* v. *Holloway* (4) they do not admit of an extension to the present case. It seems to me that in each of those cases what was decided was this. There had been a limitation of personal estate to go in accordance with limitations of real estate, and then there was a clause providing that nevertheless the personal estate should not vest in any tenant in tail who did not attain the age of twenty-one years but should on his death under that age go over. It was clear, having regard to the law, that the mischief to be provided against by that proviso only arose in case of a tenant in tail by purchase, because if the vesting took place at all it must be in a tenant in tail by purchase, and the personal estate could not possibly vest by the proviso in any tenant in tail by descent. Therefore, in view of the narrowness of the mischief to be guarded against, the terms of the proviso were held to apply only to the more limited class of tenants in tail by purchase.

The principle seems to me to be put extraordinarily neatly

(1) 5 My. & Cr. 26.
(2) 12 Cl. & F. 546.
(3) L. R. 1 H. L. 279.
(4) L. R. 5 H. L. 532.

in the speech of Lord Cranworth in *Christie* v. *Gosling* (1), where he says: "But for the proviso, any son of Ellis would, on his birth, though taking an estate which, by reference to the limitations of the real estate, is described as an estate to him and the heirs male of his body, have become absolutely entitled to the personalty. No issue of the son would have had any interest whatever. This being so, I think that it would be a forced and unreasonable construction of the will to read the words 'tenant in tail' found in the proviso as referring to any class of persons to whom nothing had been previously given. The object was to restrict and narrow the class who, but for the proviso, would have taken absolutely, not to let in any class of persons, who, if there had been no proviso, would have taken nothing." In *Martelli* v. *Holloway* (2) the most important passage seems to me this short passage in the speech of Lord Westbury (3): "When, therefore, you refer to persons taking as tenants in tail under a will, you must of necessity limit the description to those persons only who take by purchase, for no other persons can be brought within the category, or made by law to answer the description. When, therefore, you come to construe a proviso of this nature, you must bear in mind that the tenants in tail spoken of with reference to the personal estate are such tenants in tail as take by purchase alone."

I should also add, having regard to some part of the argument of Mr. Whittaker in favour of giving a construction to the will which, although the less obvious construction, is one which he says might possibly be adopted, or might with a fair measure of probability be adopted, that I think the rule as stated in the third paragraph of the head-note to the report of *Martelli* v. *Holloway* (2), that "there may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will," is a little too widely stated. It seems to me that the addition to Lord Chelmsford's statement (4) of the word "fairly" in the head-note is liable to raise some

(1) L. R. 1 H. L. 292.
(2) L. R. 5 H. L. 532.
(3) L. R. 5 H. L. 553.
(4) L. R. 5 H. L. 548.

SARGANT J. 1915 ATKINSON, *In re.* ATKINSON *v.* ATKINSON.

misapprehension, and that perhaps sufficient force is not given in that passage of the head-note to the very careful way in which Lord Chelmsford has previously stated that there was manifested in the will by the testator in that case a studious desire to avoid clashing with the law against remoteness. Lord Chelmsford said (1) " If the clause in question is capable of two constructions " ; he does not say, as I think the head-note would seem to imply, " if there is one construction which is the more probable and another which is fairly possible or fairly capable of being adopted, the latter construction may be adopted." I think he is referring to two constructions which are substantially on a par, two constructions of which the clause is equally capable, two constructions which may be put with equal fairness upon the clause.

Here there is not any context equivalent to the context in *Martelli* v. *Holloway* (2) and *Christie* v. *Gosling* (3) by which I can limit the words " tenant in tail " to " tenant in tail by purchase," and accordingly I must declare that the limitations after the life of John Atkinson were void for remoteness as regards the personal estate.

Solicitors: *Devonshire, Monkland & Co.; Neish, Howell & Haldane.*

(1) L. R. 5 H. L. 548 (2) L. R. 5 H. L. 532.
(3) L. R. 1 H. L. 279.

A. C.

ASTBURY J.
1915
Nov. 17.

In re DUNN.
CARTER *v.* BARRETT.

[1915 D. 848.]

Will—Class—Joint Tenancy or Tenancy in Common—Advancement Clause—Class taking original Share by Substitution.

An advancement clause that applies during the minority of "any person entitled to a benefit" under a will is a sufficient indication that the members of any class, whether that class be original or substitutionary, are to take as tenants in common.

L'Estrange v. *L'Estrange* [1902] 1 I. R. 467 followed.

ORIGINATING SUMMONS.

By her will, dated September 18, 1872, a testatrix devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion, and in the event, which happened, of her daughter Frances marrying she directed her trustees to stand possessed of one fifth of the income upon trust for Frances for life for her separate use, and after her decease upon trust for her children as she should by deed or will appoint, and in default of appointment upon trust for her children in equal shares, and if any such children died leaving issue such issue should stand in loco parentis, and in case Frances died unmarried or without leaving children or issue her surviving her share should be held upon the trusts of the shares of the testatrix's four other children.

The residue of the income not bequeathed for the benefit of Frances was directed to be held upon trust for the testatrix's four other children, Emily, Henry, Edith, and Ellen, in equal shares during their respective lives, and after their respective deceases the share of each of them so dying, whatever such share might be, was to be held upon trust for his or her children as he or she should by deed or will appoint, and in default of appointment upon trust for his or her children equally, and if any such child died leaving issue such issue should stand in loco parentis, and if any of the testatrix's four last-mentioned children died without leaving children "the share or shares of him or her so dying as well original as accrued shall go to his or her next of kin absolutely and in the case of any daughter exclusive of her husband."

ASTBURY J. 1915 DUNN, *In re.* CARTER *v.* BARRETT.

The testatrix then declared that the trustees should stand possessed of the capital of her estate upon the same trusts as the income.

The testatrix also declared that in case at any time " any person entitled to a benefit " under her will should be a minor or minors it should be lawful for the trustees at their discretion to apply the whole or any part of the income to which such minor or minors might be entitled in possession or expectancy for their respective maintenance and education, and also at the like discretion to apply the whole or any part of the capital fund to which any such minor or minors should be so entitled as aforesaid for his or their advancement in the world or otherwise for his or their benefit.

The testatrix died on December 12, 1900.

Her son Henry had died in February, 1899, a bachelor and intestate.

Her four daughters Frances, Emily, Edith, and Ellen all survived the testatrix, but Frances alone was now living. She had married during the testatrix's lifetime.

On June 10, 1915, the plaintiff, one of the trustees, issued this summons to determine (inter alia) on what persons the share bequeathed for Henry's benefit had originally devolved, and whether those persons took as joint tenants or as tenants in common.

On the construction of the will the Court held that the share originally devolved on the four sisters absolutely as next of kin, i.e., nearest blood relations to Henry treating him as having survived the testatrix.

The question whether the four sisters took as joint tenants or as tenants in common was then argued.

Alfred Adams for the plaintiff.

Gerard M. Hildyard, W. E. Vernon, P. F. Stokes, and *W. H. Draper,* for persons claiming the shares of the three deceased sisters on the footing of a tenancy in common. The advancement clause is only consistent with a tenancy in common, as it could only be exercised properly if an account were kept of each share separately: *L'Estrange* v. *L'Estrange* (1); *In re Woolley* (2); Jarman on Wills, 6th ed. p. 1792. It applies to any person entitled to a benefit under

(1) [1902] 1 I. R. 467. (2) [1903] 2 Ch. 206, 211.

the will, and therefore to a class taking an original share by substitution.

D. D. Robertson, for the surviving sister Frances. In *L'Estrange* v. *L'Estrange* (1) it was held that the original class took as tenants in common owing to the advancement clause. The decision is not binding in England, and in any case it should not be extended to a secondary class taking an original share by substitution. The advancement clause is satisfied if applied to the original shares only.

ASTBURY J. (after stating the facts). I have already decided that the share which Henry would have taken if he had survived the testatrix went to his four sisters as his nearest blood relations ascertained at her death. If this were all there would be no alternative but to say that they took as joint tenants. But the will contains an advancement clause in very wide terms. [His Lordship read the clause.] That clause expressly applies to "any person entitled to a benefit" under the will.

In *Taggart* v. *Taggart* (2) Lord Redesdale said: "Joint-tenancy as a provision for the children of a marriage, is an inconvenient mode of settlement, because during their minorities, no use can be made of their portions for their advancement, as the joint-tenancy cannot be severed." Though not directly applicable to the present case, the passage shows the inconvenience of construing a class gift as a joint tenancy, if the testator intended the power of advancement to apply to the members of the class.

If therefore the power of advancement applies to the class taking the benefit of Henry's share by substitution, as I think it clearly does, the question is whether this is sufficient to enable me to say there is a tenancy in common.

In *L'Estrange* v. *L'Estrange* (3) a testator devised the residue of his property to trustees for the benefit of his six children, with power to his trustees to advance such sums as they might think fit for their education and advancement. The power of advancement was in general terms, and did not refer to the portion or share of any child. After reading the power of advancement Lord Ashbourne C. said: "The question is—Does the use of these words indicate an intention

(1) [1902] 1 I. R. 467. (2) (1803) 1 Sch. & Lef. 84, 88.
(3) [1902] 1 I. R. 467, 468.

ASTBURY J. 1915 DUNN, *In re*, CARTER *v.* BARRETT.

on the part of the testator to cut down the joint tenancy to a tenancy in common? It is one of those clauses of which, when read for the first time, one may not see the full effect, or ascertain how far the words will go; but when read more closely it is clear that the words confer a power, not of maintenance, but of advancement. If a sum, perhaps of a considerable amount, were advanced for one child, it would be right to debit that sum against his or her share, and that debit could not be worked out if these children were joint tenants, and could not be done unless they were tenants in common." He then held that the advancement clause was a sufficient indication that the children were to take as tenants in common.

Applying the same reasoning I think the advancement clause enables me to say that the benefit that accrued to Henry's nearest blood relations owing to his death in the testatrix's lifetime went to them as tenants in common.

Solicitors: *Bell, Brodrick & Gray, for Macintosh, Thomas & Co., Cardiff; Willis & Willis, for A. Lionel Lane, Gloucester.*

G. R. A.

ASTBURY J. 1915 *Nov.* 17, 18.

In re VERRALL. (1)

NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL.

[1915 W. 1550.]

Charity—Charitable Purposes—Preservation for the Benefit of the Nation of Lands and Buildings of Beauty or Historic Interest—Incorporation of Society—Private Act—Construction—Mortmain and Charitable Uses Acts, 1888 *and* 1891 (51 *&* 52 *Vict. c.* 42; 54 *&* 55 *Vict. c.* 73)—*Partial Exemptions implied by Private Act—Woodland Estate—Preservation of Sylvan Beauty—Recreation Grounds Act,* 1859 (22 *Vict.* c. 27).

The plaintiffs were incorporated by a private Act for the purposes (s. 4, sub-s. 1) of promoting the permanent preservation "for the benefit of the nation" of lands and tenements (including buildings)

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(1) See p. 103, post.

of beauty or historic interest, and as regards lands for the preservation (so far as possible) of their natural aspect, features, and animal and plant life :—

Held, that these purposes were charitable purposes.

Income Tax Commissioners v. *Pemsel* [1891] A. C. 531, 583, and *In re Foveaux* [1895] 2 Ch. 501, 504, applied.

In re Macduff [1896] 2 Ch. 451 and *Blair* v. *Duncan* [1902] A. C. 37 distinguished.

Sect. 3 incorporated the plaintiffs for the above purposes, with power to purchase, take, hold, deal with, and dispose of lands and other property without licence in mortmain :—

Held, that this section merely gave the plaintiffs a licence in mortmain, with possibly a power of sale without the consent of the Charity Commissioners under the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

Webster v. *Southey* (1887) 36 Ch. D. 9 and *Luckraft* v. *Pridham* (1877) 6 Ch. D. 205 applied.

Robinson v. *London Hospital* (1852) 10 Hare, 19, and *Perring* v. *Trail* (1874) L. R. 18 Eq. 88 explained and distinguished.

Sect. 21, sub-s. 2, provided that the plaintiffs' council might by resolution determine that any lands becoming vested in the plaintiffs after the Act were proper to be held for the benefit of the nation, and thereupon such lands should be inalienable :—

Held, that devised lands made inalienable by a resolution within a year of the testator's death were not liable to be sold under the Mortmain and Charitable Uses Act, 1891, but (*semble*) lands not made inalienable within that period must be sold unless an extension of time or retention order was obtained.

Held, also, that with the above exceptions the plaintiffs were subject to all the provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891.

A woodland estate to be preserved with its natural aspect and features and in its present state and condition of sylvan beauty for the reasonable enjoyment of the public is not a recreation ground within the Recreation Grounds Act, 1859.

ORIGINATING SUMMONS.

In 1894 an association was incorporated as an association not for profit and limited by guarantee for the same purposes as declared in s. 4, sub-s. 1, of the National Trust's private Act of 1907, below stated.

By the National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 3, the association was dissolved and the members were incorporated for the purposes thereinafter mentioned by the name of "The National Trust for Places of Historic Interest or Natural Beauty" as a body corporate with perpetual succession and a common seal and with

ASTBURY J. 1915 VERRALL, *In re.* NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL.

power " to purchase take hold deal with and dispose of lands and other property without licence in mortmain."

Sect. 4, sub-s. 1, provided that " The National Trust shall be established for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life."

Sub-s. 2 provided that, subject to the provisions and for the purposes of the Act, the National Trust might " acquire by purchase gift or otherwise and may hold without licence in mortmain lands buildings and hereditaments and any rights easements or interests therein or thereover and any other property of whatsoever nature " and might maintain lands as open spaces or places of public resort, and buildings for purposes of public recreation, resort, or instruction and might accept property in trust for any " public purposes " and might upon or with respect to any property belonging to them do all such things and make all such provisions as might be beneficial for the property or desirable for the comfort or convenience of persons resorting to or using that property and might exercise full powers of ownership over their lands and property according to their estate and interest therein " not inconsistent with the objects for which they are constituted " and might apply their funds to all or any of such objects.

Sect. 5 provided that no dividend should be paid to any member.

By s. 6 the property of the association was vested in the National Trust.

Sect. 18 provided that the affairs of the National Trust should be administered by a council elected as therein mentioned.

Sect. 21, sub-s. 1, provided that " The property specified in the First Part of the First Schedule to this Act so far as the same is vested in the National Trust shall be held by the National Trust for preservation for the benefit of the nation in accordance with the objects of the National Trust and shall not be chargeable with any debts or liabilities of the National Trust and shall be inalienable."

These properties which previously belonged to the association included the old Clergy House, Alfriston; the old Post Office, Tintagel; the old Court House, Long Crendon; four acres of

Wicken Fen; thirty acres of fenland at Burwell; and twenty-three other items, worth preserving for the benefit of the nation.

Sect. 21, sub-s. 2, provided that "Whenever after the passing of this Act any lands or tenements (including buildings) shall become vested in the National Trust the council may by resolution determine that such lands or tenements or such portions thereof as may be specified in such resolution are proper to be held for the benefit of the nation and such lands or buildings shall thereupon be so held by the National Trust and shall be inalienable."

Sect. 22 provided that "The National Trust may raise money by borrowing on the security of any of their property (not being property specified in the First Schedule to this Act or in any such resolution of the council as proper to be held for the benefit of the nation) by way of specific mortgage thereof and by charging or appropriating as security for money borrowed the rents profits or income derivable from any of the lands and properties of the National Trust including the rents profits and income arising from any property held for the benefit of the nation."

Subsequently to their incorporation by their private Act the National Trust acquired various properties by conveyance or devise for the purposes of their Act, and the question arose whether conveyances to the National Trust for the purposes of their private Act must comply with the requirements of the Mortmain and Charitable Uses Act, 1888, as to enrolment and otherwise, and whether lands devised to them for those purposes must be sold within a year of the testator's death under the Mortmain and Charitable Uses Act, 1891, unless the time was extended or a retention order obtained.

On June 15, 1915, the National Trust issued this summons to determine the point.

The summons was headed in the matter of the deeds and will below mentioned, the title on the record being in fact taken from Wills' conveyance. The case, however, was listed and spoken of as *In re Verrall*, and that title is retained in the report.

On September 23, 1909, a large portion of Leigh Woods, Somerset, was conveyed to the National Trust by George Alfred Wills subject to certain restrictive covenants that he had entered into with his own vendors to keep the premises as nearly as possible in their then

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state and condition of sylvan beauty so that the picturesque and ornamental character thereof might be preserved, and so that, subject to such restrictions and by-laws as George Alfred Wills, his heirs or assigns, should impose, the premises should be available for reasonable public user.

A deed of management of even date was executed between the National Trust and George Alfred Wills whereby the National Trust covenanted (inter alia) to keep the premises as an open space devoted to the reasonable enjoyment of the public and to preserve their natural aspect and features and as nearly as possible their present state and condition of sylvan beauty.

Neither of these deeds was enrolled, but on October 18, 1909, the property was made inalienable by a resolution under s. 21, sub-s. 2.

On January 18, 1915, an ancient dovecot at Bruton, Somerset, was conveyed to the National Trust by Sir Henry Hoare. This conveyance was enrolled ex abundanti cautela. On February 15, 1915, a resolution under s. 21, sub-s. 2, was passed.

By his will, dated August 4, 1911, George Henry Verrall, who died on September 16, 1911, devised a large quantity of land in Wicken, Cambridgeshire, to the National Trust. These lands were almost the last remnant of the primæval fenland of East Anglia, and were noted homes of rare insects and plants. With the view of preserving them the National Trust only allowed access by permission.

No resolution under s. 21, sub-s. 2, had yet been passed and the time for sale had not been extended.

Gurdon, for the National Trust. There are two points, which must be taken separately: First, assuming that the purposes of the National Trust are charitable, their private Act is a complete code and so far inconsistent with the Mortmain and Charitable Uses Acts, 1888 and 1891, as to exempt them wholly therefrom; secondly, the purposes defined in the private Act are not necessarily charitable.

First. The private Act does not merely give the National Trust a licence in mortmain, but it is evidently intended to form a complete code. For instance, s. 3 gives the National Trust complete powers of acquisition and disposal of lands and s. 22 gives them power to mortgage. They could clearly sell without obtaining the consent

of the Charity Commissioners under the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29, and by parity of reasoning they can acquire lands without the formalities and restrictions of the Mortmain and Charitable Uses Acts, 1888 and 1891.

Again, under the Act of 1891 lands devised must be sold within a year of the testator's death unless the time is extended or a retention order obtained. How is that compatible with s. 21, sub-s. 2, of the private Act, which enables the National Trust by resolution at any time to make the lands inalienable ? They cannot be bound to determine within a year whether they will pass such a resolution, nor can they be bound to obtain an extension of time in that behalf. If they pass the resolution within the year while the land is clearly vested in them, it at once becomes inalienable, and cannot possibly be sold under the Act of 1891. If on the other hand they wait beyond the year and the land vests in the Official Trustee of Charity Lands subject to the provisions for sale under s. 6 of the Act of 1891 (if applicable), a resolution under their private Act will put an end to the necessity for sale and the Official Trustee will become a bare trustee of the inalienable legal estate.

The Act of 1891 is clearly excluded by s. 21, sub-s. 2, of the private Act. The case is perhaps not quite so clear as to the Act of 1888, but, having regard to the wide language of s. 3 of the private Act, it is submitted that the Act of 1888 is also excluded. Can s. 3 conceivably have intended that a voluntary gift of land inter vivos should fail if the donor died within a year ?

Austen-Cartmell, for the Attorney-General. Sect. 3 of the private Act merely removes one disability of the National Trust, namely, by giving them a licence in mortmain. It may possibly also give them power to sell without the consent of the Charity Commissioners under the Charitable Trusts Amendment Act, 1855, s. 29, but that is absolutely irrelevant to the present point. It does not remove any of the other requirements and restrictions imposed on grantors, grantees, and devisees by the Mortmain and Charitable Uses Acts, 1888 and 1891.

The National Trust are made competent grantees or devisees, but grants to them must still be attested by two witnesses, and the deeds must be enrolled under s. 4 of the Act of 1888. There is nothing in the private Act to validate a void assurance : *Webster* v.

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Southey (1); *Mogg* v. *Hodges* (2); *Luckraft* v. *Pridham* (3); *British Museum* v. *White* (4); *Robinson* v. *London Hospital.* (5) The last case is explained in Tyssen on Charitable Bequests, p. 383.

Again, under the Act of 1891 lands devised must be sold within a year of the testator's death unless the time is extended under s. 5 or a retention order under s. 8 is obtained. If the year or extended period expires before any resolution under s. 21, sub-s. 2, of the private Act is passed, the lands are no longer "vested" in the National Trust, but in the Official Trustee of Charity Lands subject to the provisions for sale under s. 6 of the Act of 1891, so that s. 21, sub-s. 2, of the private Act is no longer applicable. If, however, the resolution making the land inalienable is passed within the year or extended period, the case is not quite so clear. Prima facie the word "vested" in s. 21, sub-s. 2, of the private Act means "indefeasibly vested," and if so a retention order under s. 8 of the Act of 1891 is necessary to render the resolution finally effectual. Possibly, however, a resolution within the proper period may be treated as a sufficient compliance with s. 8. If so, the Act of 1891 is excluded to that extent, but no further. With these exceptions the Acts of 1888 and 1891 must be complied with.

Sheldon, for the Official Trustee of Charity Lands, adopted the same argument.

Gurdon in reply. In *Luckraft* v. *Pridham* (3) the private Act 6 Anne, enabling the Plymouth guardians to take land by devise without licence in mortmain, was passed at a time when lands might be devised to a charity without any restrictions, though a corporation required a licence in mortmain. The private Act therefore merely amounted to a licence in mortmain. The power of devising lands to a charity was taken away by the Charitable Uses Act, 1736 (9 Geo. 2, c. 36), and, although the private Act was revived by subsequent Acts, it not unnaturally retained its original construction and remained merely a licence in mortmain.

At the time the private Act of 1907 was passed charities could only permanently hold devised land on obtaining a retention order, and as permanent holding is necessary for the purposes of the

(1) 36 Ch. D. 9, 22.
(2) (1750) 2 Ves. Sen. 52.
(3) 6 Ch. D. 205.
(4) (1826) 2 S. & S. 594.
(5) 10 Hare, 19, 24.

plaintiff corporation, the natural inference is that the Act amounted to a licence in mortmain plus a retention order.

Robinson v. *London Hospital* (1) is not very intelligible. The Crown charter not only enabled the charity to take land by gift or devise, but also enabled testators to devise land to them. Treating the charter as valid, Turner V.-C. apparently held that the charter gave the charity a licence in mortmain and gave testators a power of devise in their behalf. In spite of this he held that the proceeds of sale of the real estate devised on trust for sale for the benefit of the charity went to the heir-at-law.

In *British Museum* v. *White* (2) there was nothing express or by implication to exclude the Charitable Uses Act, 1736.

In *Perring* v. *Trail* (3) the Westminster Hospital were empowered by 6 Geo. 4, c. xx., to acquire lands by will, and it was held that a corresponding power in testators to devise to them was implied notwithstanding the Charitable Uses Act, 1736. At that time it is true there was no power of devising lands to charity, but the case shows that the Charitable Uses Act, 1736, and its successors may be excluded by implication.

ASTBURY J. This is a summons taken out by the National Trust for Places of Historic Interest or Natural Beauty against the Attorney-General and the Official Trustee of Charity Lands for the purpose, substantially, of determining whether the National Trust is or is not bound by the Mortmain and Charitable Uses Acts, 1888 and 1891.

Assuming for the purpose of the general question that the objects of the National Trust are charitable, and that all dispositions made in its favour are charitable trusts, it is desired, in the first place, to obtain a general decision as to whether the private Act of 1907, under which the Trust was incorporated, does or does not exclude the public provisions of the two statutes of 1888 and 1891.

The National Trust was established for the purpose of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest, and

(1) 10 Hare, 19, 26, 28. (2) 2 S. & S. 594.
(3) L. R. 18 Eq. 88.

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as regards lands for the preservation of their natural aspect, features, and characteristics. An association with similar purposes had previously existed as an incorporated body, and the trust now became a statutory trust governed by a council, referred to in s. 18 of the Act, of a number of very eminent gentlemen.

It is unnecessary for the purposes of this decision to go in any detail into the provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891 ; it is sufficient to say that the first Act, following the Charitable Uses Act, 1736, imposed, in the interest of the public, certain restrictions upon the grantor and the charity with regard to the granting, obtaining, and holding real property conveyed by deed inter vivos, and the statute of 1891 removed the disabilities of charities as regards obtaining real estate by will and imposed certain restrictions upon their obtaining and holding such property. The mischief which the Charitable Uses Act, 1736, and presumably the Act of 1888, intended to mitigate is referred to in the preamble of the earlier statute, and it is sufficient to say that the provisions of those two public Acts were intended in the public interest and cannot be subsequently got rid of or evaded except by express legislation or by necessary implication in subsequent statutes.

The plaintiffs' Act of 1907, being a private Act, clearly cannot exclude the application of prior public general statutes unless and to the extent that their provisions are expressly excluded or rendered impossible of application by necessary implication from the language and effect of the later Act.

Reading through the statute of 1907 with the object of answering this question, in the first place it is to be observed there is no express mention of the earlier statutes at all nor any express exclusion of any of their provisions, and it remains to be seen whether they are, and to what extent, excluded by necessary implication.

Sect. 3 of the private Act incorporates the National Trust with power to purchase, take, hold, deal with, and dispose of lands and other property without licence in mortmain. On the authorities that is a mere licence in mortmain making them competent grantees and devisees, and possibly, read with other sections of the Act, it may give them powers of sale exercisable without the consent of the Charity Commissioners, but further it does not go.

In s. 4, sub-s. 2, the licence is again repeated and provisions made

for the administration of the trust, which administrative provisions are clearly irrelevant to the question I have to decide.

I have been carefully taken through this Act, and the only section relevant to this question is s. 21. That provides in sub-s. 1 that certain properties specified in the first part of the schedule shall be held by the trust for preservation for the benefit of the nation in accordance with the objects of the trust and shall not be chargeable with debts and liabilities of the trust and shall be inalienable. That is a statutory provision which exempts certain then existing property of the trust from debts and all power of alienation or disposition. Sub-s. 2 provides: "Whenever after the passing of this Act any lands or tenements (including buildings) shall become vested in the National Trust the council may by resolution determine that such lands or tenements or such portions thereof as may be specified in such resolution are proper to be held for the benefit of the nation and such lands or buildings shall thereupon be so held by the National Trust and shall be inalienable."

The National Trust contends that this provision indicates an intention to exclude at least from the purview of its trust the provisions of the statute of 1891.

Under that Act lands devised for charitable purposes must be sold within a year of the testator's death or such extended time as the Court may fix, and property not so sold after the lapse of the relevant period becomes vested in the Official Trustee of Charity Lands under s. 6. Under s. 8 the Court may make a retention order if satisfied that the land is required for actual occupation for the purposes of the charity and not as an investment.

It is forcibly contended, with regard to land devised to or in favour of this trust after the date of its Act, that the council, by a resolution under s. 21, sub-s. 2, passed within a year of the testator's death, can render that land inalienable and therefore to that extent annul the necessity for sale or applying for an extension of time. It is also contended that, even if such a resolution is not passed within the year, the council may still pass a resolution rendering the property inalienable, and that right is inconsistent with a compulsory sale under the Act of 1891.

In my judgment s. 21, sub-s. 2, does by necessary implication exclude the provision as to sale within a year of the testator's death

ASTBURY J. under the Act of 1891 in the case of property devised to the trust which has become inalienable by a proper resolution within that period.

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With regard to property so devised and not made inalienable within that period, it may be a question whether the extension of time or retention order provided for in the statute of 1891 may not have to be obtained ; but I see no reason for giving this sub-section a wider application, and I certainly do not think that it in any way excludes or renders nugatory the provisions of the Act of 1888 dealing with grants inter vivos. It should be remembered that a will is a matter of record, whereas a grant inter vivos is not, and the Act of 1888 is intended to make it so.

In arriving at this decision I have had the assistance of certain authorities to which I will now refer. In *Webster* v. *Southey* (1) Kay J. said : " The Mortmain Act avoids the assurance and places the grantor, as well as the grantee, under a possible disability. Statutes which remove the disability of a grantee by authorizing a corporation or other public body to acquire land, do not, unless expressly so worded, interfere with the disability of the grantor to grant. This was decided so long ago as the case of *Mogg* v. *Hodges*. (2) Power to take land in such cases is given to avoid the necessity of obtaining a license to hold in mortmain : but, nevertheless, the grantor can only grant in the manner prescribed by 9 Geo. 2, c. 36."

In *Luckraft* v. *Pridham* (3), a private Act, 6 Anne, gave a corporation power to acquire land by gift or devise, and provided that any person might without further licence give or devise land to it. The Charitable Uses Act, 1736 (9 Geo. 2, c. 36), was then passed, and subsequent private Acts relating to the corporation were passed giving it additional powers, and containing clauses providing that the clauses and powers of the private Act 6 Anne should remain in force. It was held by Hall V.-C. and by the Court of Appeal that the corporation was not exempted from the general public operation of the Charitable Uses Act, 1736. Hall V.-C. said (4) : " It appears to me that the 9 Geo. 2, c. 36, is a general law which was meant to apply to all His Majesty's subjects in reference to making dispositions

(1) 36 Ch. D. 9, 22.
(2) 2 Ves. Sen. 52.
(3) 6 Ch. D. 205.
(4) 6 Ch. D. 210.

in favour of charities such as are there described. The law was meant to be applicable to everybody, whether they selected one charity or another ; it was intended to prevent testamentary gifts of property savouring of land for charitable purposes without any exception in favour of charities having particular powers under any charter or any particular Act of Parliament passed long before, when a different policy was guiding the Legislature with reference to charitable gifts." Then, referring to the subsequent statutes, Hall V.-C. said(1): " It appears to me that these provisions do not at all support the contention sought to be founded upon them, and that it was never intended by a side-wind to alter the general law, so as to enable all testators to give whatever they thought proper to this charity." In other words, Hall V.-C. regarded the private Act really as a licence in mortmain, and not as a statutory enactment giving powers to grantors as distinct from giving relief to the grantee. The discussion which took place in the Court of Appeal during the argument (2) emphasizes, I think, the necessity for exercising considerable caution in deciding that a subsequent private Act avoids the public obligations of an earlier general statute. Jessel M.R., after referring to the Charitable Uses Act, 1736, said (3) : " It deprives men of the power of devising to charities, which power it had been found in practice was abused. It seems to me that up to this point the case is quite unarguable, the license in mortmain having nothing to do with the provisions of the 9 Geo. 2, c. 36. Then there come some later private Acts which continued the old provisions of the statute of Anne and made them applicable to the purposes of those Acts. Continuing the provisions did not alter their nature and effect. They meant just the same when they were continued as they meant before, and even if they had been re-enacted in so many words, that could not have altered their effect, which was only to dispense with the necessity for a license in mortmain." That seems to me to be a very strong and operative decision to the effect that unless and to the extent that it is expressed or made absolutely clear by necessary implication a private statute does not intend to abrogate the provisions of a public general Act.

British Museum v. *White* (4) is to the same effect, namely, that

(1) 6 Ch. D. 211.
(2) 6 Ch. D. 212, 213.
(3) 6 Ch. D. 214.
(4) 2 S. & S. 594.

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a statute giving full power, capacity, and ability to purchase, take, hold, and enjoy lands is to be regarded as a licence in mortmain merely, and not as conferring upon the grantors inter vivos or otherwise any powers that they have not got under the general law.

In *Robinson* v. *London Hospital* (1) the same view was taken by Turner V.-C., but in addition he held that the charter he had to deal with, assuming it to be valid, which he did not decide, not only gave a licence in mortmain such as in my opinion is given by the statute I have to deal with, but also purported to give an express right to testators to make devises for the benefit of the corporation in question. As the Crown charter could not abrogate the provisions of the Charitable Uses Act, 1736, this right was in the circumstances nugatory, but it is made quite plain in the judgment that unless the charter had contained that second dispensing power in favour of testators, the Vice-Chancellor would not have made the observations he did, but would have construed it as a mere licence in mortmain.

In *Perring* v. *Trail* (2) Malins V.-C. held that the particular private Act he had to construe did give a power to devise land for the use of the charity there in question in words which James L.J. in *Luckraft* v. *Pridham* (3) said were evidently pointed to the statute of 9 Geo. 2. Malins V.-C. said (4) : " I agree with Mr. Glasse, to a certain extent, that the Court ought not to presume an intention to modify or repeal a public Act of Parliament by a private one. But words in a private Act must receive the same construction as in a public one, and this hospital having had those powers conferred upon it, is entitled to all the benefits arising from a fair construction of the enactment. It is clear that if no one could give any land to the charity by will, it could not take any land by devise, and could never become possessed of any. I think, therefore, that, in order to give the words of the Act any effect, I must hold that persons are at liberty to devise land for its benefit." He held that the words were sufficient to effect the result which Turner V.-C. in *Robinson* v. *London Hospital* (5) thought were intended to be effected by the charter in that case.

(1) 10 Hare, 19.
(2) L. R. 18 Eq. 88.
(3) 6 Ch. D. 205, 213.
(4) L. R. 18 Eq. 91.
(5) 10 Hare, 19, 26.

For these reasons I think, with the exceptions I have mentioned, that the obligations and provisions of the statutes of 1888 and 1891 are not interfered with by the private Act.

Gurdon. In the case of Leigh Woods I claim exemption under the Recreation Grounds Act, 1859, s. 2.

ASTBURY J. That Act applies to conveyances of lands to trustees to be held "as open public grounds for the resort and recreation of adults, and as playgrounds for children and youth, or either of such purposes." This land is to be preserved with its natural aspect and features and in its present state and condition of sylvan beauty. It is clearly not a recreation ground within the Act.

Gurdon. Then I come to the second point, namely, that the purposes of the National Trust are not charitable purposes. In *Income Tax Commissioners* v. *Pemsel* (1) Lord Macnaghten said that "charity" in its legal sense comprised four principal divisions, the fourth division being trusts for "purposes beneficial to the community," and in *In re Foveaux* (2) Chitty J. said: "To be a charity there must be some public purpose—something tending to the benefit of the community." But neither of these judges meant to say that all public trusts for the benefit of the community are charitable: *In re Macduff* (3); *Blair* v. *Duncan.* (4) Indeed the last two cases respectively show that there are many philanthropic purposes and many public purposes that are not charitable. Again, "encouraging undertakings of general utility," though certainly for the public benefit, is not a charitable purpose: *Kendall* v. *Granger.* (5) In *Thomson* v. *Shakespear* (6) Shakespeare's house was purchased by public subscription with the view of forming a museum. A legacy to the trustees for the purpose of forming the museum was held not charitable.

The Courts have no doubt gone very far in holding institutions to be charitable in order to avoid the law of perpetuity. But that is not necessary here. The National Trust are expressly incorporated

(1) [1891] A. C. 531, 583.
(2) [1895] 2 Ch. 501, 504.
(3) [1896] 2 Ch. 451, 466, 474.
(4) [1902] A. C. 37, 48.
(5) (1842) 5 Beav. 300.
(6) (1860) 1 D. F. & J. 399.

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by statute for promoting "the permanent preservation for the benefit of the nation" of lands and buildings of beauty or historic interest. No question of perpetuity can arise, and the mere fact that the trust is for the benefit of the nation does not make it charitable.

ASTBURY J. The National Trust Act, 1907, which incorporated the plaintiff trust, provided that the trust should be established "for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest, and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life."

The question is whether the objects and purposes of this trust as so established are charitable or not. The National Trust contends that its purposes are not confined to what are known in the law as charitable purposes, and a number of authorities have been cited with the view of pressing that contention.

Apart altogether from the authorities I should have thought prima facie there could be little doubt that the National Trust holds its property upon what is essentially a charitable trust for the benefit of the nation generally. The question is whether the authorities do or do not support that view.

In *Income Tax Commissioners* v. *Pemsel* (1) Lord Macnaghten, quoting largely from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (2), said: "How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." In terms there can be no question that the fourth head obviously and necessarily includes such purposes as those defined by the private Act, but it is suggested that Lord Macnaghten's words must be taken with qualification, and that he did not mean that all purposes falling within the fourth head are charitable.

(1) [1891] A. C. 531, 583. (2) (1805) 10 Ves. 522, 532.

In *In re Foveaux* (1) Chitty J. said: "The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose —something tending to the benefit of the community." Then again within that test it seems to me that unquestionably this is and must be a charitable purpose.

A number of decisions have been cited in which the gift in question was for purposes so defined as to include what the Courts have held might or might not be charitable objects or purposes.

For instance, in *In re Macduff* (2) the head-note says: "A bequest of money 'for some one or more purposes, charitable, philanthropic, or ,' is not bad simply by reason of the existence of the blank, but must be treated as one 'for charitable or philanthropic purposes.' Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable."

Although possibly there is some slight difference in the opinions of the different judges who decided that case, there is nothing to throw any doubt upon the view I take in the present case.

In the present case the trustees are strictly limited to the specific objects and purposes referred to in the Act, which are plainly public purposes, expressly stated to be for the benefit of the nation, and have no choice of applying them to any other purposes as in *In re Macduff* (2), *Blair* v. *Duncan* (3), *Kendall* v. *Granger* (4), *Thomson* v. *Shakespear* (5), and other cases of that nature.

For these reasons it seems to me the objects and purposes of this society are plainly within the judgments of the House of Lords in *Pemsel's Case* (6) and are charitable, and essentially so, within the

(1) [1895] 2 Ch. 501, 504.
(2) [1896] 2 Ch. 451.
(3) [1902] A. C. 37.
(4) 5 Beav. 300.
(5) 1 D. F. & J. 399.
(6) [1891] A. C. 531.

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meaning and intention of a large number of other authorities on the subject.

I therefore declare that the objects and purposes of the National Trust are charitable within the legal meaning of that term.

In the case of Verrall's land a retention order was made at the plaintiffs' request, the Official Trustee of Charity Lands offering no opposition.

Solicitors: *Horne & Birkett; Treasury Solicitor.*

G. R. A.

ASTBURY J. 1915 *Nov.* 24, 25.

In re ROBSON.

DOUGLASS *v.* DOUGLASS.

[1915 R. 1042.]

Will—Contingent Remainder—Class Gift—Legal Devise—Failure of Particular Estate—Preservation of Entire Remainder—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, 3.

A testator who died after January 1, 1898, when the Land Transfer Act, 1897, came into operation, devised a freehold house to the use of his daughter for life, with remainder to the use of such of her children as should attain twenty-one in equal shares as tenants in common.

The daughter died in 1915, having had and leaving four children, two of whom had attained twenty-one during her life, and two were still infants.

The executors had assented to the devise during the life tenancy:—

Held, first, that, having regard to the initial vesting of the estate in the executors under the Land Transfer Act, 1897, the devisees originally took equitable estates only, so that the contingent remainders were originally immune from destruction.

Secondly, that the contingent remainders retained their original immunity though subsequently clothed with the legal estate on the executors' assent.

In re Freme [1891] 3 Ch. 167 applied.

ORIGINATING SUMMONS.

By his will, dated June 10, 1904, a testator, after appointing executors and trustees and making certain specific bequests, devised a certain freehold messuage called "The Oaks" "unto and to the use

of my said daughter Helen . . . . during her life and from and after her decease to the use of such of her children in fee simple as shall attain the age of twenty-one years and if more than one in equal shares as tenants in common."

After another specific devise the testator devised and bequeathed his real and personal estate not thereinbefore otherwise disposed of to his trustees upon trust for sale and conversion, the proceeds to be held upon the trusts therein mentioned. The testator also declared that the trustees should be trustees for the purposes of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42, and for the purposes of the Settled Land Acts.

The testator died on January 21, 1905, seised of "The Oaks" in unincumbered fee simple in possession, and on April 15, 1905, his will was proved by the two executors who survived him.

The life tenant Helen, who occupied "The Oaks" from the testator's death, died on April 27, 1915, having had four children and no more, namely, the plaintiff Nicholas, who attained twenty-one on September 12, 1907, the plaintiff Margaret, who attained twenty-one on April 30, 1911, and the defendants Joseph and Jane, both born May 4, 1896, and still infants.

On June 19, 1913, the plaintiff Nicholas had mortgaged his share to the defendant Elizabeth Hutton.

On July 6, 1915, the plaintiffs issued this summons to determine whether upon the true construction of the will and in the events that had happened the plaintiffs were entitled to "The Oaks" in fee simple in equal moieties as tenants in common to the exclusion of the infant defendants or who otherwise was entitled to the premises.

Daynes, for the plaintiffs. Under the law prior to August 2, 1877, when the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), was passed, this legal remainder would clearly have vested in the plaintiffs to the exclusion of the infants: Fearne on Contingent Remainders, 10th ed. vol. i. p. 312; Jarman on Wills, 6th ed. p. 1445; *Festing* v. *Allen* (1); *Brackenbury* v. *Gibbons*. (2)

In the last case there was a legal devise to H. Nundy for life, and after her decease to her children "who, either before or after her death," should attain twenty-one, and in default of such children

(1) (1843) 12 M. & W. 279, 301. (2) (1876) 2 Ch. D. 417.

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(which happened) to the children of E. Gibbons " who, either before or after her death," should attain twenty-one. At the death of H. Nundy two children of E. Gibbons had attained twenty-one. Other children subsequently attained twenty-one. Hall V.-C. treated the gift as a contingent remainder and held that the first two children were entitled.

In *In re Lechmere and Lloyd* (1) Jessel M.R. criticized this decision. Treating the two phrases " who, either before or after her death," as both referring to the death of the life tenant H. Nundy, he thought the gift ought to have been construed as an executory devise; whereas Hall V.-C. evidently read the second phrase as referring to the immediate antecedent E. Gibbons, and was consequently forced to construe the gift as a contingent remainder.

[ASTBURY J. I should have thought both phrases referred to the life tenant's death. The death of E. Gibbons was not relevant. However, Hall V.-C. in fact construed the gift as a legal remainder and decided the effect of the gift on that footing.]

Yes; and apart from the Contingent Remainders Act, 1877, his decision exactly covers this case.

I understand that the infants also propose to rely on the Land Transfer Act, 1897, by suggesting that in some way they only took equitable remainders not subject to destruction under the law of seisin; but I will deal with the Contingent Remainders Act, 1877, first. Now that Act, which allows a contingent remainder to take effect as an executory devise, only applies " in the event of the particular estate determining before the contingent remainder vests." It applies, therefore, to a contingent remainder to an individual, or to a class where no members have qualified when the particular estate determines, but it does not apply to a class remainder that has once vested in qualified members: Williams on Seisin, p. 205; Jarman on Wills, 6th ed. p. 1445.

[ASTBURY J. If the point on the Land Transfer Act, 1897, is right it concludes the matter, and it is no use going into a long academic discussion on the first point. You had better take the Land Transfer Act point first.]

I am not quite clear how it is put, and I should prefer my friend to open it.

(1) (1881) 18 Ch. D. 524, 527.

Northcote, for the infants. Equitable contingent remainders are not subject to destruction by failure of the particular estate: *In re Eddels' Trusts* (1); *Berry* v. *Berry* (2); *Astley* v. *Micklethwait* (3); and if the remainders are initially equitable they retain their immunity from destruction though subsequently clothed with the legal estate: *In re Freme* (4); Carson's Real Property Statutes, 2nd ed. p. 526; Theobald on Wills, 7th ed. p. 650.

Now under the Land Transfer Act, 1897, s. 1, sub-s. 1, the real estate vests, like a chattel real, in the executors, who, subject to their rights as executors, hold it (s. 2, sub-s. 1) "as trustees for the persons by law beneficially entitled thereto" and may assent to the devise under s. 3. The executors take their title from the will, so that the estate vests in them at the testator's death: *In re Pawley and London and Provincial Bank.* (5) The contingent remainders at the death were therefore equitable and not liable to destruction. This is the view taken of the effect of similar statutes in two colonies where the English common law prevails: *In re Beavis* (6); *In re Campion* (7); Halsbury's Laws of England, vol. xxii. p. 314 (n.). The subsequent assent of the executors has no more effect than the reconveyance by the mortgagee in *In re Freme.* (4)

[ASTBURY J. Is not the position a little different? As soon as the mortgagee is paid off he holds the bare legal estate in trust for the equitable devisees. He cannot alter their rights under the will. But under the Land Transfer Act, 1897, the executors have only limited rights. Are they not bound to assent as soon as the estate is cleared?]

No. They "may" assent under s. 3, sub-s. 1, but as trustees they cannot assent so as to alter the rights of their cestuis que trust. If they do not assent the Court "may" order a conveyance under s. 3, sub-s. 2. But it would take care not to defeat the testator's intention. It would either merely direct a conveyance of the life estate, or it would put in trustees to preserve the contingent remainders. The reference to s. 42 of the Conveyancing Act, 1881, is misconceived, as it only applies to infants in possession. But it

(1) (1871) L. R. 11 Eq. 559.
(2) (1878) 7 Ch. D. 657.
(3) (1880) 15 Ch. D. 59, 63.
(4) [1891] 3 Ch. 167.
(5) [1900] 1 Ch. 58, 64.
(6) (1906) 7 N. S. W. State Rep. 66.
(7) (1908) South Australian L. R. 1.

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clearly shows the testator's intention that all the infants were to take on attaining twenty-one.

Daynes, for the plaintiffs. In *In re Freme* (1) the testator merely devised an equity of redemption. The equitable remainders could not of course be upset by a posthumous reconveyance. In the present case the testator devised a legal estate for life with a legal contingent remainder. The construction and ultimate effect of this devise as a legal devise are not affected by the Land Transfer Act, 1897. True, notwithstanding that devise, the estate, i.e., the whole estate, legal and equitable, initially vests in the executors for purposes of administration. But subject to those purposes they hold it as trustees for the persons " by law " beneficially entitled, i.e., for the legal devisees who would " by law " have been entitled if the Act had not been passed. Until assent the devisees have really no estate at all, legal or equitable. On assent they are relegated ab initio to their position as legal devisees, the heir of course taking the reversion in fee till the contingent remainder vests.

The Act was merely intended to simplify the machinery for the administration of real assets, not to affect the ultimate rights of the persons interested, or the construction of the will: *In re Williams* (2); *In re Kempster* (3); Jarman on Wills, 6th ed. p. 1810. In other words, the Act altered the rights of administration as between the devisees and the executors, but it did not touch the construction of the will or the rights of the devisees inter se.

The case is very analogous to the effect, or rather non-effect, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), on a gift to a husband and wife and a third person. Although the wife is a statutory feme sole, she and her husband only take one share between them: *In re Jupp.* (4) It is submitted, therefore, notwithstanding the colonial decisions, that the Land Transfer Act, 1897, has no application at all, and that in any case it does not apply after assent when the devisees are properly clothed with the very legal and equitable estates the testator gave them.

Marten, for the mortgagee. If the Land Transfer Act, 1897, has the effect of turning all devised legal estates into equitable estates, a legal devise to A. for life with remainder to the first son of A. who

(1) [1891] 3 Ch. 167.
(2) [1904] 1 Ch. 52, 56.
(3) [1906] 1 Ch. 446, 450.
(4) (1888) 39 Ch. D. 148.

attains twenty-five will be void as to the remainder under the modern law of perpetuity, even though a son attains twenty-five in A.'s lifetime.

Again, a devise of an equitable estate to A. for life with a legal remainder to the heirs of his body will give A. an equitable estate tail though the limitations are obviously intended to avoid the rule in *Shelley's Case*. (1)

A construction involving such sweeping changes in the law of real property should not be lightly adopted in England.

ASTBURY J (after stating the facts). The question is whether the life tenant's children who attained twenty-one during her life are now entitled to "The Oaks" to the exclusion of the infants.

The solution depends on the answer to one or other of the following questions:—First, whether, in the events that have happened, the interests which the testator undoubtedly intended the infants to take are preserved by the Contingent Remainders Act, 1877—a moot point that has never been decided; secondly, whether those interests are preserved by the Land Transfer Act, 1897.

I will deal with the point on the Land Transfer Act, 1897, in a moment, but before doing so I will just state the nature of the question under the Contingent Remainders Act, 1877. That Act was passed on August 2, 1877. It provided that "Every contingent remainder created by any instrument executed after the passing of this Act," which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, "shall, in the event of the particular estate determining before the contingent remainder vests," be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

In a case like the present, if the life tenant had died when all the children were infants, there would have been no difficulty. The devise would have operated under the statute as an executory devise. But where, as in the present case, some children have attained twenty-one during the life tenancy and others are still infants there are two possible views: Either the remainder in its entirety is

(1) (1581) 1 Rep. 93b.

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vested in the children who attained twenty-one during the life tenancy, or the possible contingent interests of the infants are saved by the statute. The former view is preferred by most text-books, but, having regard to the view I take as to the effect of the Land Transfer Act, 1897, I do not propose to decide this point.

I will now deal with the question under the Land Transfer Act, 1897.

It is clear on the authorities that the difficulty arising from the old doctrine of seisin applies only to legal and not to equitable remainders : *In re Eddels' Trusts* (1) ; *Berry* v. *Berry* (2) ; *Astley* v. *Micklethwait.* (3)

In *Astley* v. *Micklethwait* (3) a testator devised a freehold estate to the use of his son for life, and after his decease to the use of the son's children who should attain twenty-one in equal shares. The testator had mortgaged part of the estate, and at his death the legal estate was outstanding in the mortgagees. The son died leaving four infant children. Malins V.-C. held that as to the mortgaged portion the contingent remainders were preserved from failure by the legal estate outstanding in the mortgagees, but as to the unmortgaged portion the remainders failed on the son's death. During the argument he said : " The testator had not the legal estate at the date of his will or death. His will never operated upon the legal estate. Why am I to go out of my way to destroy the will instead of preserving it ? Anything that would enable the Court to get out of the monstrous doctrine of *Festing* v. *Allen* (4) ought to be adopted. You cannot have a more forcible illustration than this very case." This " monstrous doctrine " was that the property vested in the children who attained twenty-one during the life tenancy to the exclusion of children who might subsequently attain that age.

In *In re Freme* (5) an equitable contingent remainder created before the Contingent Remainders Act, 1877, became clothed with the legal estate after that Act. North J. held not only under but also independently of the Act that the contingent remainder was not defeated by the failure of the life interest. In that case a testator

(1) L. R. 11 Eq. 559.
(2) 7 Ch. D. 657.
(3) 15 Ch. D. 59, 63.
(4) 12 M. & W. 279.
(5) [1891] 3 Ch. 167, 170.

died in 1878 having devised freeholds to his son for life and after his decease (subject to a power of appointment in the son) to the son's children who being a son should attain twenty-one or being a daughter should attain that age or marry equally between them. A portion of the freeholds was in mortgage at the date of the testator's will and death. During the life tenancy the mortgage was discharged and the property reconveyed to the uses of the will. The son then died intestate and without appointing, leaving three infant children. North J. said: "I think that all that was created by the will was an equitable contingent remainder that was not subject to the defect of failure by reason of the absence of a sufficient freehold to support it;"—the will in fact only operated on the equity of redemption—"and I do not think that the subsequent acquisition of the legal estate by the deed of 1887, can do any harm, whatever effect it might have produced if that deed had been dated before the time when the Act in question came into operation." This was the actual decision, namely, that the equitable contingent remainder having been turned into a legal contingent remainder by an instrument subsequent to the Act was preserved by the Act, the whole remainder being still contingent at the life tenant's death, as all the children were infants. North J. then proceeded to give an alternative ground for his decision: "In addition to that my impression is that there is another answer to this case, namely, the point that the contingent limitations being equitable only are not subject to being defeated by the absence of any freehold to support them, even though they had while contingent been clothed with the legal estate, and I think that that in effect is to be gathered from what fell from Vice-Chancellor Malins in *Astley* v. *Micklethwait*. (1) I think, therefore, that there are two reasons that prevent the failure of this contingent remainder." That view comes to this. Where there is a devise of an equity of redemption to a life tenant with a contingent remainder to a class of children who attain twenty-one the subsequent clothing of the equitable life estate and contingent remainder with the legal estate during the life tenancy is not enough to defeat the testator's intention that all children who attain twenty-one shall take, although their interests are still contingent at the life tenant's death.

The infants contend that the Land Transfer Act, 1897, which

(1) 15 Ch. D. 59.

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came into operation on January 1, 1898, brings the present case within *In re Freme.* (1)

Sect. 1, sub-s. 1, provides that "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." This freehold therefore vested, not in the life tenant under the legal limitation, but in the executors.

Sect. 2, sub-s. 1, provides that "Subject to the powers . . . . hereinafter mentioned, the personal representatives . . . . shall hold the real estate as trustees for the persons by law beneficially entitled thereto, ..." The executors therefore held the real estate as trustees for the persons by law beneficially entitled thereto, i.e., for persons who, having regard to the law, including the Land Transfer Act, 1897, were at the testator's death and prior to any assent under s. 3 entitled to equitable and not legal estates.

Sect. 3, sub-s. 1, provides that "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, ..." In the present case there was clearly an assent to the devise at some time during the life tenancy. From the date of this assent the property vested in the life tenant and remaindermen according to the limitations of the will; but it follows, in my judgment, from the view expressed by North J. in *In re Freme* (1), with which I respectfully agree, that the equitable contingent remainders which, having regard to the provisions of the Land Transfer Act, were originally created by the will retained their initial immunity from destruction though clothed from the date of such assent with the legal estate.

Before parting with the case I may mention that in two colonies where the old English common law prevails and there are statutes similar to the Land Transfer Act, 1897, a similar view as to the initial preservation of contingent remainders by the estate vested in the executors was taken, though the question as to the effect of a

(1) [1891] 3 Ch. 167.

subsequent assent or registered transfer was not raised: see *In re Beavis* (1); *In re Campion.* (2)

I therefore hold that the plaintiffs are not entitled to "The Oaks" to the exclusion of the infants.

Solicitors: *Field, Roscoe & Co., for Wilkinson & Marshall, Newcastle-upon-Tyne.*

G. R. A.

In re MACKENZIE.
BAIN *v.* MACKENZIE.

[1915 M. 1561.]

Power of Appointment—Limited Power—Appointment to Trustees for Objects—Settlement on Objects—Transfer of Fund.

A testator directed his trustees to set apart and invest a certain fund in their own names and to stand possessed thereof upon trust to pay the income to his niece for life and after her decease to stand possessed thereof upon trust for her children and grandchildren at such ages or times and "in such shares and manner" as she should appoint.

The niece appointed that her uncle's trustees should after her death assign, convey, and make over the fund to the trustees of her own will to hold upon certain trusts in settlement on her daughters and their children:—

Held, that, though the appointment was good as to the beneficial interests, the original trustees must continue to hold and administer the fund.

Busk v. *Aldam* (1874) L. R. 19 Eq. 16; *Scotney* v. *Lomer* (1886) 31 Ch. D. 380, 386; and *In re Tyssen* [1894] 1 Ch. 56 followed.

In re Redgate [1903] 1 Ch. 356 and *In re Adams' Trustees' and Frost's Contract* [1907] 1 Ch. 695 distinguished.

ORIGINATING SUMMONS.

By his will dated February 6, 1899, Kenneth Mackenzie devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion. He directed his trustees to set apart and invest in their own names the sum of 11,000*l.* and to stand possessed thereof upon trust to pay the income to his niece

(1) 7 N. S. W. State Rep. 66. (2) (1908) South Australian L. R. 1.

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Lilias for life, and after her decease to stand possessed thereof upon trust for such children or grandchildren of Lilias at such ages or times (not being earlier than his or her age of twenty-one years or day of marriage) and " in such shares and manner " as Lilias should by deed or will appoint, and in default of appointment as therein mentioned.

The testator died on September 29, 1900. The 11,000*l.* trust legacy was duly set aside and the income paid to Lilias for life.

By her will dated October 11, 1907, Lilias in exercise of her power of appointment directed and appointed that the trustees of Kenneth's will should after her death assign, convey, and make over the said sum of 11,000*l.* to the trustees of her own will, and she directed her own trustees to hold the same upon certain trusts settling the fund on her daughters and their children, the daughters taking life interests with a restraint on anticipation.

Lilias died on July 10, 1914, leaving five sons and five daughters, all adults and born in Kenneth's lifetime. Two of the daughters had infant children.

Part of the capital of the trust legacy had been paid to some of the above children under an appointment by deed poll of December 23, 1908, but the residue was still held by the trustees of Kenneth's will.

On June 21, 1915, the trustees of Kenneth's will issued this summons to determine (inter alia) whether they ought to continue to execute the trusts of the trust legacy or whether they ought to transfer the residue in their hands to the trustees of Lilias' will.

Sheldon, for the trustees of Kenneth's will. The appointment is good as far as the beneficial interests are concerned, but the appointor had no power to change the trustees. The original trustees were appointed by Kenneth to hold and administer the fund, and the limited power is merely a power of nominating the beneficiaries. The original trustees must still hold the fund : Farwell on Powers, 2nd ed. p. 325 ; *Busk* v. *Aldam* (1) ; *Von Brockdorff* v. *Malcolm* (2) ; *Scotney* v. *Lomer* (3) ; *In re Tyssen.* (4)

Bryan Farrer, for the five daughters of Lilias and some of her trustees. The point turns on the construction of Kenneth's will.

(1) L. R. 19 Eq. 16.
(2) (1885) 30 Ch. D. 172.
(3) 29 Ch. D. 535 ; 31 Ch. D. 380.
(4) [1894] 1 Ch. 56.

Lilias was empowered to appoint to the objects "in such manner" as she thought fit. That must surely give her a power to appoint to trustees to hold for them in settlement.

[ASTBURY J. The words "in such manner" occurred in *Busk* v. *Aldam* (1), *Scotney* v. *Lomer* (2), and *In re Tyssen*. (3) They clearly refer to the beneficial interests and not to the machinery of administration.]

The practice in those cases has been departed from in recent years: *In re Redgate* (4); *In re Adams' Trustees' and Frost's Contract* (5); Underhill on Trusts, 7th ed. pp. 425—427; Lewin on Trusts, 12th ed. p. 883; and I ask the Court to adopt the more recent practice.

A. F. Topham, for the remaining trustees of Lilias' will.

Ashworth James, for the infants.

Sheldon in reply. *In re Redgate* (4) and *In re Adams' Trustees' and Frost's Contract* (5) were real estate cases developing the principle of *Kenworthy* v. *Bate* (6), where the power was a power to appoint uses of real estate. They both turned on the direction to "convey and assure" or to "pay and transfer" the real estate to the appointees. Those words enabled the appointor to appoint trustees to sell the real estate, give a good receipt for the purchase-money, and divide it among or hold it in trust for the appointees.

The *Busk* v. *Aldam* (1) line of cases were absolutely irrelevant. They were not even cited to Buckley J. in *In re Redgate* (4), and though cited to Warrington J. in *In re Adams' Trustees' and Frost's Contract* (5), they are not mentioned in his judgment, being obviously treated as irrelevant. It is quite inconceivable that either judge can have intended to cast a doubt on a well-known line of cases without even mentioning them. They are still good law and govern the present case.

ASTBURY J. (after stating the facts). The question is whether the trustees of Kenneth's will are under any obligation to hand over the fund to the trustees of Lilias' will.

In Farwell on Powers, 2nd ed. (1893) p. 325, the learned author,

(1) L. R. 19 Eq. 16.
(2) 29 Ch. D. 535; 31 Ch. D. 380.
(3) [1894] 1 Ch. 56.
(4) [1903] 1 Ch. 356.
(5) [1907] 1 Ch. 695.
(6) (1802) 6 Ves. 793.

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after stating that where the donee of "a general power of appointment over personalty" executes the power and appoints an executor the executor is entitled to receive the appointed fund and can give a valid discharge for it, proceeds: "Where, however, the power is limited, it appears to be a question of construction whether the power authorizes a direction to transfer the fund to other trustees. An appointment of a fund standing in the names of trustees to other trustees on trust for some of the objects may be a good equitable execution so far as the interests of the appointees are concerned; but the machinery adopted may exceed the power. The appointees' beneficial enjoyment is not affected, but the trustees of the original settlement will not get a good discharge in such a case if they transfer the fund to the new trustees." He then deals with *Busk* v. *Aldam* (1), *Von Brockdorff* v. *Malcolm* (2), and *Scotney* v. *Lomer* (3), and submits that *Busk* v. *Aldam* (1) is sound in principle on the ground that a creator of a power who has chosen his own trustees and provided proper machinery for filling vacancies presumably intends the fund to remain in their custody.

In *Busk* v. *Aldam* (1) Malins V.-C. held that where the donee of a limited power of appointment over a fund of personalty appoints to trustees for objects, the Court, though recognizing the validity of the appointment, will not as a matter of right transfer the fund to the trustees appointed by the donee. After referring to *Thornton* v. *Bright* (4), *Kenworthy* v. *Bate* (5), *Trollope* v. *Linton* (6), *Cowx* v. *Foster* (7), and *Fowler* v. *Cohn* (8) on the point that an appointment to a trustee for an object was good, Malins V.-C. proceeded (9): "But those were all cases where there was real estate to be converted and no person appointed to effect the conversion, and it was decided that in that case an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be

(1) L. R. 19 Eq. 16.
(2) 30 Ch. D. 172.
(3) 29 Ch. D. 535; 31 Ch. D. 380.
(4) (1836) 2 My. & Cr. 230.
(5) 6 Ves. 793.
(6) (1823) 1 S. & S. 477.
(7) (1860) 1 J. & H. 30.
(8) (1856) 21 Beav. 360.
(9) L. R. 19 Eq. 20.

so fit, in a case where the duty of the trustees is simply to hold the fund."

In *Scotney* v. *Lomer* (1) North J. criticized *Busk* v. *Aldam* (2) somewhat adversely. In the Court of Appeal it became unnecessary to decide the point, but Cotton L.J. said: "Certainly I express no opinion in any way at variance with what is possibly the only decision on that point, namely, *Busk* v. *Aldam*." (2)

In *In re Tyssen* (3), which is almost identical with the present case, a fund was vested in the trustees of a marriage settlement upon trust after the death of the husband and wife for the children in such shares and "in such manner" as the husband and wife should by deed jointly appoint. They appointed a portion of the fund to a trustee upon certain trusts for the benefit of an object. North J. held that this portion ought to be retained by the settlement trustees. He said: "Having regard to what was said in the Court of Appeal in *Scotney* v. *Lomer* (4), I must follow *Busk* v. *Aldam* (2) if it applies to the present case. I think it clearly does apply."

The five daughters and some of the trustees of Lilias' will have asked me to follow two recent real estate cases which are said to be inconsistent with the *Busk* v. *Aldam* (2) line of authorities.

In *In re Redgate* (5) the deed creating the power limited certain real estate to the use of trustees upon trust to "convey and assure" the same to such children or issue of Elizabeth Redgate and "for such estate or estates, manner and form" as she should by will appoint. The donee appointed the real estate to a trustee upon trust to pay the rents to two objects till they attained twenty-one and on the younger attaining twenty-one to sell the real estate and divide the proceeds between the two objects. Buckley J., after referring to *Thwaytes* v. *Dye* (6), *Kenworthy* v. *Bate* (7), *Cowx* v. *Foster* (8), and *Fowler* v. *Cohn* (9) and pointing out that in those cases the limitations under the appointment were legal limitations, whereas in the case before him they were equitable, read the words of the power and said (10): "The argument is that that does not

(1) 29 Ch. D. 535, 545; 31 Ch. D. 380, 386.
(2) L. R. 19 Eq. 16.
(3) [1894] 1 Ch. 56, 58.
(4) 31 Ch. D. 380, 386.
(5) [1903] 1 Ch. 356.
(6) (1688) 2 Vern. 80.
(7) 6 Ves. 793.
(8) 1 J. & H. 30.
(9) 21 Beav. 360.
(10) [1903] 1 Ch. 360.

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enable her to create a trust for sale and division of the proceeds. First, on the language of the deed. The exact words are that the trustees should convey and assure the same 'for such estate or estates, manner and form' as Elizabeth Redgate shall appoint. It is impossible to give effect to the words 'manner and form' except by contrasting them with the words 'estate or estates.' It seems to me that they include a power to do something else than give an estate to children: that she may give to a child in some manner and form an interest in the property which shall not be an estate in the property itself." He then pointed out that even where the limitations were legal, as in *Kenworthy* v. *Bate* (1), so that one might suppose the settlor intended the appointee to take the land as land, a direction to sell with a gift of the proceeds was a good exercise of the power; and though in the case before him the appointment did not operate on the use, there was a "trust to convey," under which the appointee would get the legal estate. He added: "I should have thought that this was an a fortiori case in favour of the possibility of conversion and a trust for conversion followed by a gift of the proceeds"; and he held that the appointment to the trustee on trust to sell and divide was a valid execution of the power.

In *In re Adams' Trustees' and Frost's Contract* (2) real estate was conveyed to the trustees of a marriage settlement upon trust after the death of the husband and wife to "pay and transfer" the same to their children or issue as the survivor should appoint. The trustees had a power of sale. The husband, who survived, appointed the property to the trustees of his will on trust for sale and directed them to stand possessed of the proceeds upon a series of complicated trusts for the objects of the power. The will trustees having contracted to sell, the purchaser relied on *Busk* v. *Aldam* (3) and *Scotney* v. *Lomer* (4), and contended that, as the proceeds of sale were not to be immediately divided as in *In re Redgate* (5), the settlement trustees were the proper persons to sell and hold those proceeds. Warrington J. said (6): "This is one of those cases which are peculiarly the subject of authority, and two cases have been cited which seem to me to be directly in point, one of them being the

(1) 6 Ves. 793.
(2) [1907] 1 Ch. 695.
(3) L. R. 19 Eq. 16.
(4) 31 Ch. D. 380.
(5) [1903] 1 Ch. 356.
(6) [1907] 1 Ch. 699.

supplement of the other. Those two cases are *Kenworthy* v. *Bate* (1) and *In re Redgate* (2), a modern case." After an elaborate discussion of those two authorities his Lordship continued (3): "It has been sought to distinguish that case (2) from the present, first, by reason of the fact that" (the donee's will) "contains extremely elaborate provisions for his issue. In my opinion that is utterly irrelevant. It makes no difference at all what are the trusts of the proceeds of the sale directed by the will of the donee of the power. The question is, Had he power to make the appointment in the form in which he made it? It seems to me, therefore, that that argument cannot prevail. But an argument . . . . was based on the fact . . . . that the original settlement contained a power for the trustees to sell, which was not the case in *In re Redgate*. (2) Therefore it is said there is a conflict of powers between the trustees of that settlement and the trustees of the will, and that the proper persons to sell are the trustees of the original settlement. Now I think that is completely answered by the terms in which the power is limited . . . . upon trust 'to pay and transfer the said hereditaments and premises to' the children at such times and in such shares . . . . as the donees . . . . shall appoint. Now payment cannot be carried out except by a sale, and it seems to me that the donee of this power had under its express terms a right to say whether the property should be paid or . . . . transferred. He could . . . . have directed that the trustees should transfer the property to the children; he could . . . . have directed them to pay it. The only way . . . . he could direct freehold estate to be paid would be by creating a trust for sale. It seems to me, therefore, that the creation of the trust for sale in this case is expressly authorized by the terms of the power. If that is so, then that power overrides the power of sale contained in the settlement. The donee had a right to direct that . . . . the property should be sold; and he had, in my opinion, on the authorities, a right to direct that it should be sold by the trustees of his own will."

That being the state of the authorities, I feel bound to hold that the terms of the power in the present case bring it exactly within the *Busk* v. *Aldam* (4) line of authorities and that it does not come

(1) 6 Ves. 793.
(2) [1903] 1 Ch. 356.
(3) [1907] 1 Ch. 702.
(4) L. R. 19 Eq. 16.

ASTBURY J. within the special grounds of decision in *In re Redgate* (1) and *In re Adams' Trustees' and Frost's Contract.* (2)

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MACKENZIE, *In re.* BAIN *v.* MACKENZIE.

The creator of the power has chosen the persons whom he wished to hold and execute the trusts of this fund. I have therefore no right or power to direct them to transfer it to the trustees appointed by the donee.

There will therefore be a declaration that the plaintiffs are not under any obligation to transfer any portion of the fund to the trustees of Lilias' will.

Solicitors : *Crosley & Burn ; Kekewich, Smith & Kaye.*

G. R. A.

ASTBURY J. NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED *v.* UNITED ELECTRIC THEATRES, LIMITED.

1915

Dec. 1, 2.

[1915 N. 716.]

Company—Receiver and Manager—Mortgage—Business—Specific Business Premises—Present and Future Chattels thereon—Right to use Chattels — Construction — Floating Charge on Chattels — Rates —Priority—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209.

By a bank mortgage of August 11, 1914, the defendants conveyed and assigned to the plaintiffs (inter alia) their electric theatre business, specific business premises, and all chattels then or thereafter placed thereon.

The mortgage was to secure the defendants' banking account, and it was intended that they might use the chattels in carrying on their business.

The chattels were now in the possession of a receiver and manager appointed in a foreclosure action at a time when certain rates were due from the defendants :—

Held, that so far as both present and future chattels were concerned the mortgage was merely a floating security, so that the charge on the chattels ranked after claims for rates, which were preferential over such a floating charge under the Companies (Consolidation) Act, 1908, ss. 107, 209.

Observations in *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523, 541 ; *Governments Stock Investment Co.* v. *Manila Ry. Co.*

(1) [1903] 1 Ch. 356. (2) [1907] 1 Ch. 695.

[1897] A. C. 81, 86; and *In re Yorkshire Woolcombers Association* [1903] 2 Ch. 284, 295, affirmed sub nom. *Illingworth* v. *Houldsworth* [1904] A. C. 355, 358, applied.

SUMMONS.

By a mortgage dated August 11, 1914, and made between the defendants of the one part and the plaintiffs of the other part, the defendants covenanted that they would on demand pay the plaintiffs all moneys then or from time to time owing by the defendants to the plaintiffs upon banking account.

For further securing the payment of those moneys the defendants, as beneficial owners, conveyed to the plaintiffs all and singular the hereditaments and premises described in the schedule, "together with all and singular the fixed and movable plant machinery and fixtures implements and utensils now or hereafter fixed or placed upon or used in or about the said hereditaments and premises respectively," to hold the same unto and to the use of the plaintiffs in fee simple.

For further securing the payment of the moneys aforesaid the defendants as beneficial owners assigned to the plaintiffs, first, all the goodwill of the business of proprietors of electric or cinematograph theatres and of every other business (if any) then or at any time during the continuance of the security carried on at or upon the said hereditaments and premises respectively and the benefit of existing and future licences therefor; secondly, "All and singular the furniture and loose effects which now are or may from time to time be placed upon or used in or about the hereditaments and premises," to hold the same unto the plaintiffs absolutely, subject, nevertheless, as to all the hereditaments and premises thereinbefore conveyed and assigned to the proviso for redemption therein contained.

The defendants covenanted to keep the buildings in repair and insured against fire, to apply for and endeavour to obtain renewals of licences for carrying on the businesses, to use the said hereditaments and premises for the purpose of the businesses and to conduct them in a regular and proper manner, and not to permit the premises to be used otherwise than as first-class electric or cinematograph or variety, dramatic, or other theatres or other places of amusement, and not to let the premises without the plaintiffs' written consent.

It was agreed that the plaintiffs might give time for payment to

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the parties liable on any bill of exchange discounted by them for the defendants on which the defendants might be liable as drawers or indorsers without in any manner releasing the defendants or affecting the security, and that the mortgage should constitute a continuing security notwithstanding any settlement of account.

It was further agreed that in the event of the plaintiffs receiving notice that the defendants had incumbered or disposed of their equity of redemption in the said hereditaments the plaintiffs should be entitled to close the then current account and to open a new account with the defendants, and that no money paid to the new account should discharge any part of the amount due to the plaintiffs on the closed account.

The schedule contained six plots of land, on three of which electric theatres were built, one being the Picture Palace, Walsall. This was in the defendants' possession, but some of the other land was let to tenants.

On April 26, 1915, a demand note for 40*l.* for poor rate, general district rate, and borough rate on the picture palace for the six months ending September 30, 1915, was served on the defendants. These rates were not paid.

On July 1, 1915, the plaintiffs commenced a foreclosure action, and on July 2, 1915, the Court appointed Chantrey to receive the rents and profits of the properties and assets comprised in and subject to the mortgage and to manage the respective businesses carried on by the defendants at or upon the said properties, and the tenants of the said properties were to attorn and pay their rents to Chantrey as such receiver; and it was ordered that the defendants should deliver over to Chantrey as such receiver and manager "all the stock in trade and effects of the said businesses."

Acting in pursuance of this order, Chantrey took possession of the picture palace as receiver and manager on July 5, 1915.

On August 21, 1915, the rates were demanded from the receiver. The receiver offered to pay the proportion of the rates from the date of his appointment, but the offer was not accepted.

On September 16, 1915, summonses against Chantrey as receiver and manager of the defendants were issued, and on September 20 the borough summary jurisdiction Court made a judgment for payment and for distress in default.

On September 23, 1915, the plaintiffs issued the present summons in the foreclosure action for an order that the receiver and manager should not pay the rates made due and payable before the date of his appointment, notwithstanding the summonses and judgment against him, or in the alternative that he should not pay the proportion of the rates applicable to the period prior to his appointment.

The summons was served on the defendants and on the Walsall Corporation, and it was arranged that the question of the receiver's liability should be determined on this summons. The defendants did not appear at the hearing.

The plaintiffs took two points. First they contended that there had been a change of occupation within the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 16, and similar statutes as to general district rates and borough rates. The Court, however, held that the receiver had merely taken possession of the stock in trade and effects of the business he was appointed to manage, and not of the land, possession of which was not ordered to be delivered to him, so that there was no change of occupation within the statutes: see *In re Marriage, Neave & Co.* (1)

The plaintiffs secondly contended that the mortgage was a specific legal mortgage of the chattels existing at the date thereof and a specific equitable mortgage of future chattels on the premises, so that the chattels belonged to the plaintiffs and could not be distrained on for rates assessed on the defendants, the "offenders" in default.

The Walsall Corporation contended that the mortgage was merely a floating security on all the chattels, so that they were distrainable for rates.

The second point is alone reported.

Hon. Frank Russell, K.C., and *Arthur Sims*, for the plaintiffs. The rates can only be levied on the offenders' goods. Now all the chattels on the premises at the date of the mortgage were legally assigned to the plaintiffs, and no distress can be levied on them for the defendants' rates. We are instructed, though there is no evidence, that there were no future chattels. If, however, there were any future chattels, they passed by equitable assignment, the

(1) [1896] 2 Ch. 663.

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moment they came on the premises, without any further act of the plaintiffs or defendants: *Tailby* v. *Official Receiver* (1); *In re Lind.* (2)

Both assignments were obviously specific. There is nothing in either to suggest a floating security. The right to use or deal with the chattels in the ordinary course of business does not make the security floating. It is implied in every mortgage of stock in trade. The mortgage did not of course require registration as a bill of sale: *In re Standard Manufacturing Co.* (3)

Manning, for the Walsall Corporation. The charge on the future chattels (if any) is purely equitable and is therefore no protection against rates: *In re Marriage, Neave & Co.* (4) The mortgage of the original chattels, though apparently a legal assignment, is in reality only a floating security, as all the chattels were obviously intended to be used, changed, renewed, or otherwise disposed of for the purposes of the business: *Governments Stock Investment Co.* v. *Manila Ry. Co.* (5); *Tailby* v. *Official Receiver* (6); *In re Yorkshire Woolcombers Association* (7), affirmed in the House of Lords sub nom. *Illingworth* v. *Houldsworth.* (8) If the security is floating the rates take priority as preferential payments under the Companies (Consolidation) Act, 1908, ss. 107, 209.

Arthur Sims in reply. I admit that the security, if floating, is within s. 107. But it would be almost impossible to find a security more thoroughly specific. There is first a conveyance of the land; that is specific. Secondly, a legal assignment of the existing chattels on that land; that is equally specific. Thirdly, an equitable assignment of future chattels brought on that land; that is a specific equitable assignment operating on each chattel as it is brought on the land.

It is contended that an equitable charge is no protection against rates. But the observations in *In re Marriage, Neave & Co.* (4) were directed to the equitable charge in that case, namely, an equitable charge created by debentures and obviously floating. The covering deed, which corresponds to the present mortgage,

(1) 13 App. Cas. 523, 533, 546.
(2) [1915] 2 Ch. 345.
(3) [1891] 1 Ch. 627.
(4) [1896] 2 Ch. 663, 673, 675, 677.
(5) [1897] A. C. 81, 86.
(6) 13 App. Cas. 523, 541.
(7) [1903] 2 Ch. 284, 295.
(8) [1904] A. C. 355, 358.

expressly excepted the chattels from the assignment, and Lindley and Rigby L.JJ. both laid stress on that point. (1) However, the future chattels (if any) are unimportant. The main question is whether the mortgage was a floating charge on the existing chattels, most if not all of which remain and can be easily identified.

In *Governments Stock Investment Co.* v. *Manila Ry. Co.* (2) Lord Macnaghten defined a floating security as " an equitable charge " on the assets for the time being of a going concern. In the present case there was a legal mortgage of the existing chattels.

In *Tailby* v. *Official Receiver* (3) Izon assigned present and future chattels on his present or future places of business, and also his present and future book debts to Tyrrell. Tyrrell's executors sold the book debts to Tailby. Then Izon became bankrupt. He subsequently paid one of the future book debts to Tailby. The official receiver sought to recover it as money had and received. The only question before the Court was whether the future book debts had passed. The chattels were not in question, and there was no conveyance of any specific land to define them.

Now in holding that the assignment of future book debts was good Lord Macnaghten undoubtedly described the bill of sale as a floating security. But he was only considering it in relation to book debts, and later on he said (4) it was unnecessary to consider the Bills of Sale Acts as choses in action were not personal chattels. He cannot have intended to say that a legal mortgage of ascertainable chattels, if properly registered under the Act of 1878, or made by a person immune from registration as in the present case, was a floating security on existing chattels merely because it assigned future chattels as well. This is quite clear if his later definition of " floating security " in *Governments Stock Investment Co.* v. *Manila Ry. Co.* (2) is considered.

Again, in *In re Yorkshire Woolcombers Association* (5) the mortgage of present and future book debts with a provision enabling the mortgagors to collect them till the mortgagee intervened was obviously a floating security on all the debts. It did not attach

(1) [1896] 2 Ch. 673, 678.
(2) [1897] A. C. 81, 86.
(3) 13 App. Cas. 523, 541.
(4) 13 App. Cas. 542.
(5) [1903] 2 Ch. 284.

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till the mortgagee intervened. How can that apply to a definite legal assignment of chattels where no further step is necessary ?

In the present case there is a legal assignment of the original chattels, which are capable of being ascertained and defined, and that assignment falls exactly within Lord Macnaghten's definition of a specific charge in *Illingworth* v. *Houldsworth*. (1) These chattels are therefore the plaintiffs' property and cannot be distrained for the defendants' rates.

ASTBURY J. (after stating the facts and dealing with the first point). The second point is whether the chattels upon the Walsall theatre belong to the plaintiffs or whether they belong to the defendants subject to a floating charge within s. 107, sub-s. 1, of the Companies (Consolidation) Act, 1908.

The plaintiffs contend that the mortgage was a specific mortgage of the chattels then existing independently of the attempted charge on future chattels. If that is the true construction of the mortgage, it was a valid mortgage of the existing chattels, as the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), does not apply to mortgages or charges of an incorporated company: see *In re Standard Manufacturing Co.* (2)

The Walsall Corporation, on the other hand, contend that notwithstanding the form of the mortgage it is really and in effect merely a floating charge as far as all the chattels and effects upon the mortgaged premises are concerned.

In *Governments Stock Investment Co.* v. *Manila Ry. Co.* (3) Lord Macnaghten said: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes."

Here it is quite plain that as far as the chattels were concerned this mortgage did not intend to interfere with the ordinary carrying on by the defendants of their theatre business, with all the necessary

(1) [1904] A. C. 355, 358. (2) [1891] 1 Ch. 627.
(3) [1897] A. C. 81, 86.

changes in plant, machinery, utensils, and chattels that such carrying on of the business would from time to time necessitate; and indeed the mortgage itself specified that the defendants should conduct the business of their various theatres in a regular and proper manner in all respects. But the plaintiffs contend that the words of the mortgage are too strong to allow it to be construed as a floating charge with regard to the chattels existing at the date of its execution. That contention is I think unsound.

In *Tailby* v. *Official Receiver* (1) the facts were that by a bill of sale of 1879 a packing case manufacturer assigned to Tyrrell by way of mortgage "all and singular the stock in trade, fixtures, shop and office furniture, tools, machinery, implements and effects now being or which during the continuance of this security may be in upon or about" the mortgagor's premises, and also "all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor." It is quite true that that was a wide assignment, but still it was an assignment in fact of present and future chattels and effects upon the mortgagor's place of business. Lord Macnaghten said (2): "It assigns to Tyrrell by way of mortgage, among other property, all the stock in trade and effects which during the continuance of the security might be on the mortgagor's then premises, and also . . . . 'all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor' . . . . I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes." That applies to the security in this case absolutely and in terms.

In *In re Yorkshire Woolcombers Association* (3) a similar question arose. Two years after issuing debentures secured by a trust deed the company by an apparently specific mortgage assigned to Illingworth all the book and other debts then owing, or which might

(1) 13 App. Cas. 523. (2) 13 App. Cas. 541.
(3) [1903] 2 Ch. 284.

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at any time during the continuance of the security become due and owing to the company, and the full benefit of all securities for the present and future and other debts in trust for certain guarantors in proportion to their respective liabilities. The question was whether that was a specific or a floating charge. It is quite true it was stronger than in the present case, because it was a charge only on the book debts, and the provisions of the mortgage showed that they could be collected from time to time by the company. Farwell J. held that the mortgage was merely a floating charge. In the Court of Appeal Romer L.J. stated (1) that a mortgage or charge by a company which contains the three following characteristics is a floating charge: "(1.) If it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3.) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

That category applies to this case. Of course all cases differ in degree. This not being a mortgage by a manufacturing company, the chattels charged would not change with the same frequency as in a manufacturing business; but where a company like the defendants carry on a considerable number of theatres, and charge the whole of their present and future stock in trade, furniture, loose effects, plant, machinery, and so on that may be upon the various premises, and agree to carry on their business in the ordinary course, I think that is a charge upon a class of chattels all of which in the ordinary course of business would or might be changed or removed from time to time.

In the House of Lords in the same case, sub nom. *Illingworth* v. *Houldsworth* (2), Lord Macnaghten said: "I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its

(1) [1903] 2 Ch. 295. (2) [1904] A. C. 355, 358.

nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

For the reasons mentioned in those authorities I think that the charge on the chattels in the present case is a floating rather than a specific charge. I may add that if the parties had intended it to be a fixed charge on the chattels existing at the date of the mortgage it would have been a very simple thing to have provided a schedule of them as they did in the case of the hereditaments.

This mortgage, being merely a floating charge on the chattels, is a debenture within s. 107 of the Companies (Consolidation) Act, 1908, and the rates are payable as preferential payments under that section.

There will be no order except that the plaintiffs pay the corporation's costs, such costs and the plaintiffs' own costs to be costs in the action. Leave to appeal if necessary.

Solicitors : *J. B. & G. S. Beirnstein ; Ward, Bowie, Porter & Co. for Herbert Lee, Town Clerk, Walsall.*

G. R. A.

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1915

Nov. 24, 25, 26.

THARP *v.* THARP.

[1915 T. 533.]

Will—Settled Estates—Limitations to A. for Life, Remainder to B. in Tail—Codicil giving A. an exclusive Power by Deed or Will to appoint to a Class—A. a Member of the Class—B. not a Member—Revocation of Codicil—Restoration of Codicil on A.'s Promise not to interfere with B.'s Succession—Appointment by A. to himself in Fee—Fraud—Promise enforced—Invalid Appointment.

By the will and five codicils of a testator real estates were settled to the use of his wife during widowhood, remainder to the use of A. for life, remainder to the use of the first and every other son of A. successively in tail male, remainder to the use of such person or persons of a special class as A. should by deed or will appoint, remainder in default of such appointment to B. for life, remainder to the first and every other son of B. successively in tail male, with remainders over.

A. was married but had no children. He was a member of the class, B. was not. The testator's wife, desiring that B. should not be excluded from succeeding to the estates, induced the testator to make a sixth codicil by which he revoked the power of appointment given to A. by the fifth codicil. On hearing of this A. had an interview with the testator's wife at which he gave her his written promise to leave the estates to B. on acquiring the power to do so if she would get the testator to revoke the sixth codicil. The testator's wife communicated this promise to the testator, who thereupon destroyed the sixth codicil. After the testator's death A. by deed appointed the estates to himself in fee on failure of his issue male. In an action by B. to enforce the promise :—

Held, that the appointment was fraudulent and void, for that A. could not exercise the power so as to interfere with B.'s right of succeeding to the estates.

Quaere, whether the donee of an absolute and exclusive power of appointment in favour of a special class can bona fide exercise the power by appointing to himself, he being a member of the class.

WITNESS ACTION.

William Tharp was absolutely entitled to a freehold estate in the county of Cambridge, known as "the Chippenham Park estate," and prior to September, 1899, his testamentary dispositions consisted of his will and four codicils, and provided that on his death the Chippenham Park estate should stand limited to the use of his wife for life determinable on her remarriage (in which event she was

to receive a jointure of 2000*l.* per annum during the residue of her life charged on the estate), and after her death or remarriage (which should first happen) to the use of the defendant, Arthur Tharp, for life, with remainder to the use of his first and every other son severally and successively according to their respective seniorities in tail male, with remainder to the use of Horace Neville Tharp for life, with remainder to the use of the first and every other son of Horace Neville Tharp severally and successively according to their respective seniorities in tail male, with divers remainders over.

On September 13, 1899, the testator made a fifth codicil to his will and thereby directed that his will should be read as if the following use was inserted immediately after the use of the first and every son of the defendant severally and successively according to their respective seniorities in tail male, (that was to say) to the use of such person or persons being lineal descendants of his (the testator's) grandfather John Tharp for such estates and in such order or manner as the defendant should by deed or will appoint, and for default of such appointment, and subject to any such appointment if incomplete, to the use of Horace Neville Tharp for life, with remainders over as expressed in the will and fourth codicil.

On October 12, 1899, the testator made a sixth codicil and thereby revoked the power of appointment conferred on the defendant by the fifth codicil, and all the uses declared in his testamentary dispositions immediately after the use in favour of the first and every other son of the defendant, and directed that the Chippenham Park estate should stand limited in remainder expectant on the failure of the said use in favour of the first and every other son of the defendant to the use of the plaintiff for life, and after his death to the use of the first and every other son of the plaintiff severally and successively according to their respective seniorities in tail male, with remainder to the use of the testator's nephew Edward Bond for life, with divers remainders over.

On October 16, 1899, the testator destroyed the sixth codicil.

During October, 1899, the testator was residing at Chippenham Park and was confined to his room, being seriously ill with little hope of recovery. In November, 1899, he died, and his will and the five codicils were proved by his widow and the defendant, who were the executors thereof.

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The defendant, Arthur Tharp, had been married many years, but had no children. He and several other persons were lineal descendants of the testator's grandfather, John Tharp.

The plaintiff, Gerard Tharp, who was a bachelor, was not a lineal descendant of John Tharp. He was a nephew of the testator and the eldest son of Horace Neville Tharp, who died some years after the testator. He commenced this action in April, 1915, and by his statement of claim alleged (inter alia) that on October 15, 1899, the defendant, who had become aware of the execution and contents of the sixth codicil, came to Chippenham Park and had an interview with the testator's wife and asked her why she had allowed the testator to execute it, as the bringing in of Edward Bond would cause her and the defendant trouble after the testator's death; that she told the defendant (as the fact was) that the sixth codicil had been executed at her request because she was afraid that the defendant might in fact execute the said power of appointment so as to exclude the plaintiff from succeeding to the Chippenham Park estate; that the defendant thereupon promised the testator's wife that if she would get the testator to revoke the sixth codicil it would make no difference in the plaintiff's position, and that, failing the defendant and his male issue, the estate should go to the plaintiff, and that thereupon the defendant, at the request of the testator's wife, wrote out and handed to her his written promise to the effect that he would leave the estate to the plaintiff in the event of his (the defendant) acquiring the power to do so; that immediately after this interview the testator's wife went to the testator's room and told him what had transpired between the defendant and herself and showed him the written promise, and that the testator, in reliance on the defendant's promise and in the belief that he could trust to the defendant to do nothing to defeat his (the testator's) wish that the estate should go to the plaintiff after the defendant's death and on failure of his male issue, determined to revoke the sixth codicil, and for that purpose obtained the sixth codicil from his solicitor on October 16, 1899, and destroyed it on the faith of the said promise; that by reason of the circumstances aforesaid the defendant was at the testator's death and was still affected by a trust to carry into effect the wishes of the testator with regard to the plaintiff as expressed in the said testamentary

dispositions and was precluded in equity from defeating such wishes, and that in particular the defendant was not entitled to exercise the said power of appointment so as to defeat or in any way prejudice the estate in tail male conferred on the plaintiff by the said will and codicils; that shortly before the issue of the writ in the action the plaintiff ascertained that on December 5, 1899, the defendant executed a deed poll whereby he purported, in exercise of the power of appointment conferred on him by the fifth codicil, to appoint the Chippenham Park estate to himself absolutely in the event of the failure of the estate in tail male limited by the said will and codicils in favour of his first and every other son; that the said appointment was in breach of the defendant's promise and of the trust imposed on him as aforesaid and was therefore fraudulent and void; that the deed poll was also invalid and inoperative by reason of the fact that the defendant was not, according to the true construction of the fifth codicil, an object of the power of appointment and was not thereby authorized to exercise the same in his own favour; and the plaintiff claimed (1.) a declaration that by reason of the said trust imposed on the defendant he was not entitled to exercise the power of appointment over the Chippenham Park estate conferred on him by the fifth codicil so as to defeat the estate in tail male of the plaintiff under the said will; and (2.) a declaration that the appointment of December 5, 1899, was wholly invalid and inoperative as being unauthorized by the power and in breach of the said trust, or in the alternative was invalid and inoperative except in so far as it enabled the defendant to settle or devise the Chippenham Park estate upon or to the plaintiff.

The defendant by his statement of defence denied the allegations of the plaintiff, and alleged that he had two interviews with the testator's wife on October 15, 1899; that at the first interview he told her that he disapproved of her having induced the testator to execute the sixth codicil and told her to advise the testator to revoke it, and that no written or verbal promise was made or even mentioned until the second interview; that the testator's wife then went to the testator's room to advise him to revoke the sixth codicil, and that he (the defendant) was not aware of what took place between the testator and his wife. The defendant admitted that the testator determined to revoke the sixth codicil, but he denied that the testator came to

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such determination in reliance on the defendant's promise or in the belief as alleged in the statement of claim ;. and he further alleged that at his second interview with the testator's wife he informed her (as the fact then was) that he intended to leave the estate to the plaintiff if its ultimate disposition should be left in his hands, and that then the testator's wife obtained from him the following memorandum in writing, " I undertake to leave Chippenham estate to Gerard Tharp on my acquiring power to do so," and he informed her at the time that the memorandum was in no sense a legal document ; that on October 17, 1899, he burnt the sixth codicil in the presence and at the request of the testator, and immediately informed the testator's wife that it was burnt at the testator's request ; and he denied that the deed of appointment was in breach of any promise or any trust imposed on him, and insisted that it was valid and effectual.

No question of undue influence was raised, the testator, although very ill, being admittedly of sound mind and capable of giving effect to his wishes.

It appeared that on October 26, 1899, the defendant, at the request of the testator's wife, wrote the plaintiff, who was then starting with his regiment to South Africa for the Boer war, as follows : " One line to wish you farewell and God-speed. Come back covered with glory and be an honor to the family. My best wishes go with you for the present and the future. We have always been the best possible friends and you can rely on me to do all in my power in your interests." At the same time the testator's wife wrote the plaintiff, who knew the purport of the sixth codicil, informing him of the defendant's promise and assuring him that he could trust the defendant. It also appeared that Mrs. Tharp first knew of the deed of appointment in 1908.

Maugham, K.C., and *Fairfax Luxmoore*, for the plaintiff. The sixth codicil secured to the plaintiff the inheritance of the estate, and the defendant obtained the revocation of that codicil on his promise that the plaintiff should have the property if he lived. Therefore the defendant's conscience is affected by a secret trust or promise which precludes him from appointing the property to himself so as to defeat the inheritance of the plaintiff, and it is a

promise or trust which this Court will enforce: *McCormick* v. *Grogan* (1); *Russell* v. *Jackson* (2); *Jones* v. *Badley* (3); *Pearce* v. *Vincent* (4); *In re Evered.* (5) A covenant to leave property by will to a person is good; *Blandy* v. *Widmore.* (6) In the next place, the defendant, on the true construction of the power, could not appoint to himself. It was not intended that by exercising the power he should become the absolute owner of the estate so as to dispose of it just as he liked. It is a limited power and in a sense fiduciary, and it is submitted that where the donee of a power to appoint to a particular class of relations is himself one of that class, he is excluded and cannot appoint to himself: Farwell on Powers, 2nd ed. p. 492; *In re Sinclaire's Estate* (7); *Taylor* v. *Allhusen.* (8)

Jenkins, K.C., and *Owen Thompson*, for the defendant. This is a case of first impression, and there is nothing like it in the books. The plaintiff is driven to a contention that affects absent parties. If the appointment is bad, the plaintiff has still the power to appoint to lineal descendants of John Tharp, but it is said that by a promise made by him in the testator's lifetime he is precluded from exercising the power in favour of any other members of the special class. It is settled that if property is given to a man on a condition he is bound by the condition, but if property is given to joint tenants, one of whom is bound by a secret trust, the other joint tenant who has no notice of the trust is not bound: *In re Stead.* (9) Suppose the defendant had appointed to some other lineal descendant, the plaintiff would have had to contend that the appointment was bad. The onus is on the plaintiff to prove a secret trust, and there must be clear evidence of fraud: *Jones* v. *Badley.* (3) Probabilities will not do. It is submitted that the evidence fails to show that the testator relied on any promise of the defendant. But if he did, what was the promise? The plaintiff's case rests entirely on the parol evidence of Mrs. Tharp, but it is submitted that parol evidence at this distance of time should not be allowed

(1) (1869) L. R. 4 H. L. 82, 88.
(2) (1852) 10 Hare, 204, 212.
(3) (1868) L. R. 3 Ch. 362.
(4) (1832) 2 My. & K. 800.
(5) [1910] 2 Ch. 147.
(6) (1716) 1 P. Wms. 324.
(7) (1867) Ir. R. 2 Eq. 45.
(8) [1905] 1 Ch. 529.
(9) [1900] 1 Ch. 237, 240, 241.

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to override the written document given at the time, and that unless the defendant was in a position to give the property to the plaintiff his promise did not apply. It is submitted that both Mrs. Tharp and the defendant were under a misapprehension as to the extent of the power. They thought it was a power to appoint by will and that it could be appointed to the plaintiff. The written promise bears out this view and should not be extended. The plaintiff is not seeking to graft a trust on to the will, but to contradict the will and to make the power subservient to his own estate tail; but parol evidence to contradict a will is not admissible: *In re Huxtable.* (1) Here the donee of the power has only a mere power of selection, and it is said that you can control that power in favour of a person not an object of the power by a parol promise contradicting the power. The principle of *Russell* v. *Jackson* (2) is much cut down by *Tee* v. *Ferris.* (3) Further, in 1908 Mrs. Tharp knew that the defendant repudiated, but nothing has been done until now. Lastly, on the question of the construction of the power, it is submitted that the defendant could appoint to himself. There is very little authority on the point. *In re Sinclaire's Estate* (4) is distinguishable. In *Montefiore* v. *Guedalla* (5) it was held that the donee of a power to appoint a new trustee could appoint himself, but in *In re Sampson* (6) it was held he could not. The distinction between the two cases is that in the latter case the power was to appoint some " other person " a new trustee.

NEVILLE J. In dealing with the facts of this case one must bear in mind that no question of undue influence has been or could be raised with regard to the testamentary dispositions of the testator. He was of sound disposing mind and capable of giving effect to his wishes whatever they might be. That being so, I approach the circumstances which existed at the time when the critical interviews between the defendant and Mrs. Tharp and Mrs. Tharp and her husband took place.

The plaintiff was not only a relative of the testator, but also a closer relative of Mrs. Tharp, and there can be no question that

(1) [1902] 2 Ch. 793.
(2) 10 Hare, 204.
(3) (1856) 2 K. & J. 357.
(4) Ir. R. 2 Eq. 45.
(5) [1903] 2 Ch. 723.
(6) [1906] 1 Ch. 435.

Mrs. Tharp was very earnestly desirous that he should have a chance of succeeding to the estate. There never was any intention of putting the plaintiff—I will call him "Gerard" for convenience—in front of the defendant, Arthur. Arthur's was the first family which was to inherit the estate according to the testator's intentions. He was to have a life estate and his sons were to follow him in tail male, and it was only upon failure of sons to Arthur and the termination of his own life interest that Gerard's interests were to arise at all. Under those circumstances the testator's dispositions are altered. They are altered undoubtedly at the instigation of Arthur, and there is inserted between the limitations in favour of his family and the limitations in favour of Gerard's family a power to him of appointing to any of the lineal descendants of the testator's grandfather. That was not communicated to Mrs. Tharp at the time when the transaction took place, and it is a little curious that, although we have a diary of Arthur's of a somewhat elaborate character with abundant entries extending over the dates when the matters chiefly important in the present action took place,—it was the one and only diary that he ever kept—it has no entries with reference to the transactions that took place a month earlier when the codicil which gave him this power of appointment was executed. Mrs. Tharp having been told what was done realized that Gerard's inheritance was in jeopardy. Gerard at that time was an officer in the Army and was about to proceed to South Africa, and although the operations there have since sunk into comparative insignificance, one can well recollect the anxiety with which relatives in England saw their sons and their relations going to the front, and it was not an unnatural idea, in fact it was true, that even having regard to the minor losses in South Africa the contingency of an early death on the part of those who took part in the operations was not to be ignored. What was to happen if Gerard failed to come back from South Africa was one thing, what was to happen if Gerard did come back from South Africa was, of course, quite another, and Mrs. Tharp was exceedingly anxious that in case of his return the right of inheritance which at that time under the testator's testamentary dispositions he possessed should not be taken away from him. The result was a communication directly or indirectly with Arthur which led to his visit to

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Chippenham Park on October 15, 1899, and, according to his own account of the transaction appearing in the diary, there is no doubt to my mind as to what the real fear in Mrs. Tharp's mind was. As he put it, the moment she saw him she plunged in medias res. She had in the meantime known of, and I have no doubt in some ways assisted to obtain, the sixth codicil from the testator which secured the right of succession to Gerard in his turn and deprived Arthur of the right to oust him by appointment. That of course was what rendered Arthur, as he said, indignant and led to the interview which is the most important part of the case so far as the facts are concerned. He saw her and they had a discussion on the subject. There is no doubt as to the weapon he used to influence her, and I think it was perfectly well known on both sides that her influence would go a long way with the testator, and therefore it was very important at all events that she should be won over to Arthur's views. The defendant was on the closest terms of affection with her, superficially at all events; the letters that passed between them show a very intimate friendship. The weapon which he used was the reference to the Bonds in the ulterior limitations contained in the sixth codicil, and he stated or explained to her that it would be exceedingly undesirable for her as first tenant for life and for him as second tenant for life to have the Bonds entitled in succession, because his view, right or wrong, was that they would prove to be exceedingly troublesome people to deal with, and that their enjoyment of the estate would be hampered by the fact that these people were entitled in remainder; and ultimately he got her consent to see the testator and to try and put the matter right by getting rid of the sixth codicil, which would of course have the result of reinstating his power of appointment in case his sons did not inherit. I have no doubt whatever that he obtained that consent from Mrs. Tharp by complete assurances that what he proposed should not affect in any way the right of Gerard to inherit. It is said that there is a document which shows that the promise was of some other kind. Having regard to the nature of the case, that seems to me to be a matter of insignificance. Mrs. Tharp was, so far as I can judge from her evidence in the box, a woman singularly unacquainted with legal matters and quite incapable of either stating or understanding the legal effect of wills or deeds or powers of appointment

or anything of the kind. But what I am sure she was determined about was that, if she could help it, Gerard should not be deprived of his right of succession to the estate. With regard to that I am clear that when the interview with Mrs. Tharp terminated and she went to see her husband it was upon the promise by Arthur that Gerard's interest should not be affected by the revocation of the sixth codicil, which was what he wanted. There really seems to me to be very little difference in the evidence given by Arthur and by Mrs. Tharp as to what took place at that time. That a solemn promise was given by him to the effect I have stated I have no doubt whatever, and the only question that remains is whether that promise was communicated to the testator so as to affect his subsequent action in the revocation of the sixth codicil. In the view I take of the evidence that undoubtedly was so. I hold that the testator knew of the promise that had been made, and that in consenting to revoke the sixth codicil he understood he was not interfering with Gerard's rights under his testamentary dispositions. What followed was this. The codicil was destroyed. The testator shortly afterwards died. One of the earliest acts of the defendant was to seek legal advice as to whether he could under the power of appointment which had been restored by the destruction of the sixth codicil appoint in his own favour. He was advised that he could do so, and before the end of the year he executed an appointment of the estate to himself. With what intention, was pretty clearly disclosed when trouble arose between Mrs. Tharp and himself later, and when he proposed to use this appointment to himself for the purpose of selling the reversion and investing the proceeds in a life annuity for himself.

On those facts, how does the matter stand ? In my opinion, if a man in dealing with a person who is making testamentary dispositions of his property promises that if a certain thing is done by his will, either in his own favour or in favour of some nominee of his, and upon the faith of that promise the testator executes the testamentary disposition, a subsequent action by the person who makes the promise in contradiction of what he promised is a fraud, and I consider that the jurisdiction of the Court in the cases to which I have been referred is founded on fraud and nothing but fraud. I do not think it is what is sometimes called equitable

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fraud, which is a mental disorder which I have never been able to fathom, but it is in my opinion simply fraud. The reason why relief could not be given at law was perfectly obvious. The only Court which could give relief was the Court of Equity by affecting, as it was said, the conscience of the person who committed the fraud and saying that he should not, either for himself or for anybody else, take advantage of the fraud that he had committed. I think that the use of the words "trust" and "secret trust" depends first of all upon the fact that in every case as far as I know the question has arisen with regard to a bequest or devise of property direct to the person charged with the fraud, and to the fact that equity dealing in trusts usually applied the term "trust" to every case where they would not allow a man to act according to his legal rights but imposed upon his conscience the necessity of doing equity. I agree that so far as I know, and so far as I can find from the reported cases, a case identical with this has never previously occurred. Here you have the case of a man who says, not if you will make a will, but if you will destroy a codicil so as to revive the effect of the codicil made in my favour giving me a power of appointment, I will undertake not to exercise it so as to interfere with the right of Gerard in his turn to inherit the estate. That, it appears to me, can be enforced by a Court of Equity. Whether you call it a trust or not I care not. To me it seems to be a condition which the Court must enforce against the person who made the promise, the condition being that the power which in terms would enable him to do so is not to be used so as to affect the interests of Gerard which he would have had under the testamentary dispositions independently of the exercise of the power of appointment; and in my opinion a declaration to that effect will have to be made.

In the view I have taken of the facts and of the law it is immaterial to consider whether under the power of appointment the defendant had a right to appoint to himself or not, and with regard to that I say nothing. But what I do say is that in my opinion he is not entitled to exercise the power of appointment over the Chippenham Park estate conferred on him by the fifth codicil so as to defeat the estate in tail male of the plaintiff under the testamentary dispositions of the testator, and there will also be a declaration that

the appointment dated December 5, 1899, is wholly invalid and inoperative. NEVILLE J. 1915 THARP v. THARP.

Solicitors: *Corbould, Rigby & Co.; Michael Abrahams, Sons & Co.*

H. L. F.

In re WALLER.

MARGARISON *v.* WALLER.

[1914 W. 3094.]

SARGANT J. 1915 *Nov.* 24.

Will—Gift of Annuity and Legacies to Wife—Settlement Estate Duty—Legacy Duty—Appropriation of Fund to pay Annuity out of "net income"—Incidence of Duties—Finance Act, 1894 (57 *&* 58 *Vict.* c. 30), *s.* 5—*Finance Act,* 1896 (59 *&* 60 *Vict. c.* 28), *s.* 19—*Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 58, *sub-ss.* 2, 4.

Testator, who died prior to the passing of the Finance (1909-10) Act, 1910, by his will, made in 1908, bequeathed certain articles and sums of money "free of duty," and then bequeathed to his wife his jewellery and certain household goods and effects, and also bequeathed to her two pecuniary legacies and a life annuity, in each case without any mention of duty. He also bequeathed pecuniary legacies and life annuities to other persons, all "free of duty," and gave the residue of his real and personal estate to trustees on trust to sell and convert and out of the proceeds to pay his funeral and testamentary expenses and pecuniary legacies (other than annuities) and the duty on such specific and pecuniary legacies and annuities as were bequeathed free of duty, and upon trust to invest the residuary moneys and out of the income of his residuary estate to pay the annuities thereinbefore bequeathed until the payment thereof should be provided for as thereinafter directed, and subject thereto settled his residuary estate on certain persons for their respective lives, and after their respective deaths on their respective children; and he thereby authorized and directed his trustees to appropriate out of his residuary estate such part thereof as should at the time of such appropriation be sufficient to answer by means of the "net income" thereof the annuities thereinbefore bequeathed, and directed that upon such appropriation being made the rest of his residuary estate should be discharged from the annuities, and directed that the trustees should by means of the income of the annuity fund, or, if that were insufficient, then by means of the

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capital, pay the annuities thereinbefore bequeathed and apply the surplus, if any, of the income as if it were income arising from the rest of his residuary estate, and as the annuities fell in directed a proportionate part of the annuity fund to fall into his residuary estate.

The trustees had appropriated an annuity fund accordingly:—

Held, that the settlement estate duty payable in respect of the annuity fund was payable out of the residuary estate and not out of the annuity fund.

Held, also, that the widow must bear in respect of as well her annuity as her specific and pecuniary legacies the legacy duty imposed by s. 58 of the Finance (1909-10) Act, 1910.

ADJOURNED SUMMONS.

Thomas William Waller, by his will, dated June 7, 1908, bequeathed to several persons therein named certain articles and sums of money "free of duty," and then bequeathed to his wife his jewellery and certain household goods and effects, and also bequeathed to her two pecuniary legacies of 2000*l.* each and an annuity of 4000*l.* during her life, in each case without any mention of duty. He also bequeathed a number of pecuniary legacies and life annuities to other persons, all "free of duty," and directed that the annuity bequeathed to his wife should have priority over all the other annuities, and that the payment of the said annuities should be provided for by his trustees in manner thereinafter expressed. He devised and bequeathed all his real and personal estate (except what he specifically disposed of by his will or any codicil thereto) to trustees on trust to sell and convert and out of the proceeds to pay his funeral and testamentary expenses and pecuniary legacies (other than annuities) and the duty on such specific and pecuniary legacies and annuities as were bequeathed free of duty, and upon trust to invest the residuary moneys and out of the income of the said residuary moneys and investments (therein called his residuary fund) "to pay the annuities hereinbefore bequeathed" until the payment thereof should be provided for as thereinafter directed, and, subject as aforesaid and to the provision thereinafter directed to be made for the payment of the said annuities, directed his trustees to divide the residuary fund into six shares which he settled on certain persons for their respective lives, and after their respective deaths on their respective children. He also empowered his trustees to postpone the sale and conversion of his real and

personal estate and authorized and directed them to appropriate and set apart out of his residuary fund and his real and personal estate or out of any of the same premises "such part or parts thereof as shall at the time of such appropriation be sufficient to answer by means of the net income thereof the annuities hereinbefore bequeathed"; and further directed that upon such appropriation being made the rest of his trust fund and real and personal estate and the income thereof should be wholly discharged from the said annuities; and declared that the funds and premises to be so appropriated (thereinafter called "the annuity fund") should, notwithstanding such appropriation, remain subject to all the trusts, powers, and provisions thereinbefore contained in regard to the sale, conversion, investment of, and otherwise in connection with his trust fund and his residuary real and personal estate; and further directed that his trustees should "with and by means of the income of the annuity fund or (if and whenever such income shall be insufficient for that purpose) with and by means of the capital or corpus thereof pay the annuities hereinbefore bequeathed" (due regard being always had to the priority therein-before given to the annuity of his said wife), and should apply the surplus (if any) of such income as if the same were part of the income of the rest of his residuary fund; and further declared that, if and whenever any of the said annuities should cease to be payable, so much of the annuity fund as should leave a balance thereof sufficient by means of the income thereof to answer the remaining annuities or annuity should revert and fall into the residue of his trust fund or his residuary real and personal estate.

The testator made two codicils, dated respectively October 7, 1909, and October 9, 1909, whereby he gave further annuities and legacies "free of duty."

The testator died on January 20, 1910.

The Finance (1909-10) Act, 1910, which was passed on April 29, 1910, by s. 58, sub-ss. 2 and 4, imposes legacy duty at the rate of 1 per cent. where the person taking the legacy is the wife of a testator dying on or after April 30, 1909.

On May 22, 1911, the trustees appropriated an annuity fund pursuant to the direction in the will, the income of which produced the exact sum required for payment of all the annuities. The trustees

SARGANT J. had provisionally paid out of residue the settlement estate duty on the annuity fund amounting to 1228*l.*, together with a further sum of 162*l.* for interest thereon, and also the legacy duty on the widow's annuity and legacies.

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This was an originating summons raising (inter alia) the following questions, namely: (1.) (*a*) whether the settlement estate duty which became payable upon the testator's death in respect of the annuity fund or any and what part thereof ought to be charged against the testator's residuary estate in exoneration of the annuity fund or how otherwise the same ought to be borne; (*b*) whether the interest paid upon the said settlement estate duty or any and what part of such interest ought to be charged against the income of the testator's residuary estate in exoneration of the income of the annuity fund or how otherwise the same ought to be borne; (2.) whether the legacy duty which became payable upon the testator's death in respect of the benefits thereby given to the testator's widow was payable by the widow or out of the testator's residuary estate.

Austen-Cartmell, for the summons.

W. R. Sheldon, for the testator's widow. The settlement estate duty is payable out of the residue. The trustees are not only authorized but are directed to appropriate such a sum as will be sufficient out of the "net income" thereof to pay the annuities. If the settlement estate duty is taken out of the annuity fund the net income is thereby reduced proportionately contrary to the direction contained in the will. There is no possible distinction between the words "net" and "clear" in this connection, and the present case is governed by *Haynes* v. *Haynes* (1); *In re Currie* (2); *In re Saunders* (3); *In re Dyet* (4); *In re Coxwell's Trusts* (5); Theobald on Wills, 7th ed. p. 196. There is a sufficient contrary intention expressed to exclude the operation of s. 19 of the Finance Act, 1896; *In re Dyet.* (4)

It is the same with regard to the legacy duty imposed by s. 58 sub-s. 2, of the Finance (1909-10) Act, 1910, on as well the widow's

(1) (1853) 3 D. M. & G. 590.
(2) (1888) 57 L. J. (Ch.) 743; 59 L. T. 200; 36 W. R. 752.
(3) [1898] 1 Ch. 17.
(4) (1902) 87 L. T. 744.
(5) [1910] 1 Ch. 63.

annuity as her specific and pecuniary legacies. As regards the annuity, the words "net income" in the appropriation clause are sufficient to throw the legacy duty as well as the settlement estate duty on the residue. As regards the widow's specific and pecuniary legacies, it is to be observed that in every other case where such a direction was then necessary the testator has expressly given all legacies free of duty. It is a just inference that he intended the widow's legacies to be equally free of legacy duty, and to reduce the provision made for the widow by the amount of the duty retrospectively imposed by the Legislature after the date of the will and codicils will defeat the intention of the testator.

H. M. Adler, for the other annuitants, supported the same argument as to the settlement estate duty and referred to *In re Turnbull.* (1)

J. H. Stamp, for the persons interested in the residuary estate. As to the settlement estate duty, the argument against me is rested only on the direction to appropriate a net fund; until the appropriation the trustees are directed to pay out of the income of the residue "the annuities hereinbefore bequeathed," and the widow's annuity, not being given free of settlement estate duty, must up to this point bear its share of that duty. After the appropriation there is no gift of the income of the appropriated sum to the annuitants, but the trustees are only directed to pay thereout the annuities "hereinbefore bequeathed," and the widow's annuity is an annuity subject to settlement estate duty. *In re Campbell* (2) and *Attorney-General* v. *Owen* (3) show that the creation of an annuity fund lets in settlement estate duty, and the same principle applies to an annuity directed to be paid out of the income of a settled residue.

As to legacy duty on the widow's annuity there is no case directly in point. This legacy duty is payable on the recipient's benefit according to actuarial valuation by four instalments at the end of the first, second, third, and fourth years after the testator's death: Legacy Duty Act, 1796, s. 8. Unlike estate duty, it is a burthen imposed not on the fund but on the beneficial interest taken by the recipient and must be borne by the recipient. This annuity is not bequeathed free of duty, and the words "net income"

(1) [1905] 1 Ch. 726. (2) [1902] 1 K. B. 113.
(3) [1899] 2 Q. B. 253.

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in the appropriation clause cannot enlarge the original gift of the annuity. The express provision in the residuary clause for payment out of residue of the duty on legacies and annuities bequeathed free of duty is inconsistent with any implied direction throwing the legacy duty in respect of the wife's annuity upon the income of the residue. The creation of the annuity fund is merely machinery for securing the payment of the annuity previously bequeathed, which is an annuity subject to duty.

As regards the specific and pecuniary legacies to the widow the case is stronger and the duty must clearly be borne by the widow.

Owen Thompson and *E. W. Hansell*, for other parties.

SARGANT J. The first two questions raised by this summons relate to the incidence of settlement estate duty and legacy duty under the following circumstances. The testator's will and the codicils to the will were all made at a time long after the imposition of estate duty and settlement estate duty, but at a time when no legacy duty was payable by the widow of a testator, the liability to payment of legacy duty by the widow at the rate of 1 per cent. being subsequently imposed by the Finance (1909-10) Act, 1910. The testator by his will bequeaths certain specific articles and two legacies of 2000*l.* each to his wife, and also an annuity of 4000*l.* a year during her life. He then bequeaths a number of other annuities, stating in each case that they are to be free of duty. He did not say that the legacies or annuity given to his wife were to be free of duty, the reason no doubt being that at that time there was no legacy duty payable in respect of gifts by a husband to his wife. He then gives an interim direction that pending the constitution of an annuity fund, for which he makes elaborate provision in a subsequent part of the will, the income of his residuary estate is to be applied in payment of the annuities previously given by his will, and later on he gives elaborate directions to his trustees for the constitution of what he describes as an "annuity fund." [His Lordship here read the material parts of the clause above set out, and proceeded:] I will deal first with settlement estate duty, which was an existing charge at the date of the will. The gift of the annuity simpliciter would not, in my opinion,—at any rate I am not aware of any decision to that effect—have rendered any

part of the testator's estate a settled fund or have subjected the annuity to the payment of settlement estate duty—that is to say, the principal gift of the annuity would not have rendered it liable to settlement estate duty at all. The liability to settlement estate duty according to the cases to which I have been referred—*Attorney-General* v. *Owen* (1) and *In re Campbell* (2)—would seem to arise from the direction to set aside a portion of the testator's estate for the purpose of paying the annuity; and when I come to see the terms in which the testator directs that to be done I find that he provides that the fund to be set aside is an amount "sufficient to answer by means of the net income thereof the annuities hereinbefore bequeathed." It is settled by a long succession of cases to one of which only I need refer—a case decided by Swinfen Eady J., *In re Dyet* (3)—that where the original gift is of a fund sufficient to produce a "clear" yearly sum—and in my opinion no distinction can be drawn for this purpose between a "clear" yearly sum and a "net" yearly sum—that is sufficient to exonerate the fund from settlement estate duty and to throw it on the residuary estate. It comes to this, therefore, that under the original gift of the annuity there would be no settlement estate duty payable, and that under the administrative direction, if it had stood alone, there would have been no obligation on the annuitant to bear it. In my opinion, therefore, there being nothing in the principal gift of the annuity and nothing in the ancillary direction to set aside a fund for the purpose of satisfying the annuity, if either of those clauses stood alone, to impose any obligation on the annuitant to pay settlement estate duty, the conjoint operation of the two clauses cannot create any such liability on the part of the annuitant. I therefore hold that as regards settlement estate duty it is payable out of the residuary estate and not out of the annuity fund.

The other question is whether the legacy duty, which was the charge imposed after the making of the will and codicils, has to be provided by the widow. If the only gift to the widow had been contained in the direction to set aside such a sum as would by means of the net income thereof give her 4000*l.* a year, I think she would

(1) [1899] 2 Q. B. 253. (2) [1902] 1 K. B. 113.
(3) 87 L. T. 744.

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have been entitled to get her 4000*l.* a year free from any duty that might have been subsequently imposed by the Legislature in respect of that sum. Certainly in the analogous case of the gift of the annuities given to the other annuitants the effect of the direction that they are to be paid free of duty obviously is to exonerate them not only from the lower rate of duties in force at the date of the will but from the increased rate of duties subsequently imposed by the Finance (1909-10) Act, 1910. On the other hand, if the only gift to the widow in this will had been a gift of an annuity of 4000*l.* a year, then I think that, though the operation of that bequest at the time of the will would have been to give her a full annuity of 4000*l.* a year, yet, inasmuch as the Legislature has thought fit in the interval to impose a tax upon widows who are legatees under the wills of their husbands, the widow would have to bear her own legacy duty. There being the two gifts in this case, which of the two results is to ensue? In my opinion, looking at the will as a whole, the principal and governing gift is the original gift to the widow of the annuity of 4000*l.* a year, and the elaborate directions with regard to the annuity fund are really only machinery for the purpose of pointing out to the trustees the way in which they are to provide for the benefits previously given, including the benefit of the 4000*l.* a year to the wife. That being so, I cannot think that the result of the subsequent direction is to enlarge the gift which under the previous part of the will, taken in conjunction with the subsequent enactment of the Legislature, has been reduced to an annuity of 4000*l.* less legacy duty at 1 per cent. on the value. In my opinion, therefore, the widow has to bear the legacy duty upon her annuity, and so far as relates to legacy duty the same will be the case as to all the benefits which she takes under the will.

Austen-Cartmell. A further question is raised by the summons, namely, how the interest on the settlement estate duty ought to be borne as between tenant for life and remaindermen of the residuary fund. It is proposed that the duty should be paid out of capital and that the interest should be paid out of income, and no objection to this course is taken by any of the parties interested in the residue.

SARGANT J. That seems a reasonable course to adopt. I stated in *In re Wills* (1) that, although it might be the strict course to pay the duty and interest together out of capital and then to make an apportionment, it would often be sufficiently accurate if the capital of the duty were paid out of capital and the interest out of income.

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Solicitors: *Tamplin, Tayler & Joseph; Stibbard, Gibson & Co.; Solicitor to the Board of Trade.*

A. C.

WESTMINSTER CORPORATION AND UNITED TRAVELLERS CLUB COMPANY, LIMITED *v.* CHAPMAN.

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1915
Nov. 15, 16.

[1914 W. 1839]

Company—Winding up—Preferential Payments—Insufficiency of Assets for Payment of Preferential Creditors—Costs and Expenses of Winding up—Rates — Sole Debenture-holder — Debenture creating Floating Charge—Priorities—Action against Debenture-holder to recover Contribution—Parties—Form of Order—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69) *s.* 209, *sub-ss.* 1 (*a*), 2 (*b*), 3.

By the Companies (Consolidation) Act, 1908, s. 209, sub-s. 1 (*a*), parochial or other local rates due from a company at the date of a winding up, and having become due and payable within twelve months next before that date, are (inter alia) made preferential debts. By sub-s. 2, "The foregoing debts shall— . . . . (*b*) In the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge." By sub-s. 3, "Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them":—

Held, that the effect of sub-s. 1 (*a*), sub-s. 2 (*b*), and sub-s. 3 of s. 209 was to make the costs and expenses of the winding up payable out of the assets not comprised in the debenture security before the payment of the preferential debts, but that if the general

(1) [1915] 1 Ch. 769.

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assets after the discharge of the costs and expenses of the winding up were insufficient for the payment of these preferential debts, then, to the extent to which they were insufficient, the amount must be made up by the debenture-holder whose security creates a floating charge upon the company's property out of the property comprised in or subject to that charge, or in other words, that whether a creditor was an unsecured creditor or a debenture-holder whose only security was that of a floating charge he was equally to be postponed in respect of any claim of his against the assets of the company until those preferential debts had been paid, but that the free general assets must be exhausted before recourse was had to the assets charged.

Where in a winding up the general assets are insufficient for the payment of the preferential creditors of the company, the proper plaintiff, in an action under s. 209 of the Act, to recover contribution from a debenture-holder with a floating charge towards payment of a preferential debt is the liquidator acting in the name of the company.

WITNESS ACTION.

This was an action brought by the Westminster Corporation and the United Travellers Club Company, Limited, against Charles Francis Chapman, claiming a sum of 127*l.* 4*s.* 5d. which they alleged was payable by him to the plaintiff corporation or alternatively to the plaintiff company. The facts were as follows :—

The plaintiff company was registered on September 7, 1911, as a company limited by guarantee without share capital, and was formed to acquire and conduct a club at 134, Piccadilly. The company was carried on at a loss, and on January 16, 1912, a debenture bond for 8000*l.*, constituting a floating charge over the whole property and assets of the company other than the sums payable by the contributories under their guarantee in the event of a winding up, was issued to François Sammarcelli and George Leclair as security for advances made by them in connection with the furnishing and formation of the club.

By a trust deed of the same date the whole of the property and assets of the company, with the same exceptions, were conveyed to trustees for the better securing of the payment of the debenture bond.

On May 1, 1912, the debenture bond was transferred to the defendant, who thereupon became and remained the sole debenture-holder of the company.

On May 27, 1913, a winding-up order was made against the plaintiff company on the petition of a creditor, and the official receiver became the liquidator with a committee of inspection. To meet the claim of the defendant under his security the trustees of the debenture trust deed, with his concurrence, on July 23 and 24, 1913, sold the property comprised in the security, and a sum of 1473*l.* 10*s.* 3*d.*, representing the net proceeds of the sale, was received by the defendant or on his behalf. The whole of the property sold was included in the floating charge above referred to.

In the meantime, on April 1, 1913, a general rate ordered by the plaintiff corporation was duly made for the half-year ending September 30, 1913, for the parish of St. George, Hanover Square, within which the club premises were situate. It was admitted by the defendant, in answer to interrogatories, that the proportionate part of such rate payable in respect of the said premises to July 23, 1913, up to which date the plaintiff company was in possession, was 127*l.* 4*s.* 5*d.*, and it was not disputed that that sum was due from the plaintiff company at the date of the winding-up order.

The plaintiffs claimed (1.) a declaration that the 127*l.* 4*s.* 5*d.* was payable in priority to all other debts in the winding up of the plaintiff company (other than debts to which priority was given by s. 209 of the Companies (Consolidation) Act, 1908, if any), and that the said debt or sum had priority over the claims of the defendant under his debenture bond, and was payable on failure of general assets out of the property therein comprised; and (2.) payment by the defendant to the plaintiff corporation, or alternatively to the plaintiff company, of the sum of 127*l.* 4*s.* 5*d.*

It appeared from the evidence that the liquidator had received a sum of 88*l.* 17*s.* 2*d.* from the guarantors and had applied it in payment of the costs and expenses of the winding up, leaving a balance in his hands of 1*l.* 8*s.*, which was the only general asset of the company.

E. W. Hansell, for the plaintiffs. The question in this case turns on the construction of s. 209 of the Companies (Consolidation) Act, 1908. (1) The object of that section was to give priority in

(1) Companies (Consolidation) Act, 1908, s. 209:—

Sub-s. 1: "In a winding up there shall be paid in priority to all other debts—

"(*a*) All parochial or other

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the case of a winding up to the debts referred to in sub-s. 1, which include debts in respect of parochial and other rates, over all other debts of the company, whether due to unsecured creditors or to creditors holding debentures secured by a floating charge on the property of the company. In *Richards* v. *Kidderminster Overseers* (1)—a case under the Preferential Payments in Bankruptcy Act, 1888—it had previously been held that there was no preferential charge in respect of rates on the effects of a company in the hands of a receiver for debenture-holders, and it was to meet that decision that sub-s. 2 (*b*) was added: see Buckley on Companies, 9th ed. p. 483; see also *In re Waverley Type Writer*. (2) Sub-s. 2 (*b*) provides that the debts referred to in the section shall, so far as the assets of the company available for payment of the general creditors are insufficient to meet them, have priority over the claims of the holders of debentures under a

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local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment . . . . "

Sub-s. 2: "The foregoing debts shall—

"(*a*) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

"(*b*) In the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge."

Sub-s. 3: "Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them."

Sub-s. 5: "The date hereinbefore in this section referred to is—

"(*a*) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; . . . . "

(1) [1896] 2 Ch. 212.

(2) [1898] 1 Ch. 699.

floating charge created by the company and be paid accordingly out of any property comprised in and subject to that charge. By sub-s. 3, which appears to be new, the liquidator is authorized to retain such sums as may be necessary for the costs and expenses of the winding up before paying the preferential debts.

[YOUNGER J. I very much doubt whether it was ever intended that the costs of the winding up should have a preference over the claims of the debenture-holders under their floating charge—that is to say, that by any kind of marshalling moneys contributed by debenture-holders in respect of unsatisfied preferential debts could be applied by the liquidator in payment of costs.]

In the present case the liquidator has applied, as he was entitled to do under sub-s. 3, the moneys received by him from the contributories under their guarantee with the exception of a sum of 1*l.* 8*s.* in payment of the costs and expenses of the winding up. He has now only that sum in his hands available for the payment of the preferential claim for 127*l.* 4*s.* 5*d.* The defendant has received 1473*l.* 10*s.* 3*d.* in respect of the property comprised in his floating charge, which is more than sufficient to discharge that claim. The liquidator is therefore entitled to recover from the defendant under sub-s. 2 (*b*) the 127*l.* 4*s.* 5*d.* less the 1*l.* 8*s.* in his hands.

[YOUNGER J. In order to secure the payment of the costs and expenses of the winding up where there are no free assets the liquidator on that view has only to bring in a preferential claim against the debenture-holder.]

Sub-s. 2 (*b*) applies only where the debenture is secured by a floating charge. A debt is not the less a debt because it is secured by a floating charge. The plaintiff corporation is entitled to say that it had a statutory charge for its debt on the property comprised in the defendant's security, and that that debt being a preferential debt, the defendant ought to pay it over direct out of the assets received by him.

[YOUNGER J. If the plaintiffs are to get this money I should prefer that they should do so in the name of the plaintiff company. The liquidator is the convenient hand to distribute the assets of the company.]

[*In re Mannesmann Tube Co.* (1) was also referred to.]

(1) [1901] 2 Ch. 93.

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Harold S. Simmons, for the defendant. The plaintiffs are here asking the Court to disturb the relative positions of the plaintiff company and the defendant as mortgagor and mortgagee, which the Court ought not to do: *In re Mannesmann Tube Co.* (1) It is contended on behalf of the plaintiffs that as soon as a preferential claim is established, that lets in the costs and expenses of the winding up in priority to the claim of the debenture-holder under his floating charge.

[YOUNGER J. In this case the moneys received by the liquidator from the contributories were not included in the defendant's charge, but were general assets of the company. The liquidator was therefore clearly entitled to apply them in payment of the costs and expenses of the winding up before he considered the preferential claims.]

It is obvious that there must be other preferential claims besides the claim of the plaintiff corporation. The effect of acceding to the plaintiffs' contention would be this: that as soon as there is a preferential claim (as there must be in nearly every instance) the debenture-holders holding a floating charge become automatically postponed to the costs and expenses of the winding up. So drastic a change in the law, if intended by the Legislature, would, it is submitted, have been provided for in express terms.

The defendant's point in answer to the whole claim is that the wrong parties are before the Court. The plaintiff company seeks an innocuous declaration, namely, that the claim of the plaintiff corporation is a preferential debt. The plaintiff company cannot itself claim payment of the debt because the money is not due to it. The plaintiff corporation cannot alone sue because there is no privity of contract between it and the defendant. It is a mere accident that the defendant is the sole debenture-holder. There might have been a thousand debenture-holders, and it can hardly be contended that they could all have been sued. Further, the proceeds of the sale of the assets comprised in the defendant's security were not received by the defendant, but by the trustees of the debenture trust deed.

[YOUNGER J. The substantial proposition, if Mr. Hansell's

(1) [1901] 2 Ch. 96.

contention is correct, is that the defendant has received moneys belonging to the plaintiff corporation.]

The action ought, it is submitted, to have been brought against the trustees.

[YOUNGER J. The defendant is not prejudiced by the trustees not being made defendants.]

That is admitted, but that fact does not enable the plaintiffs to sue the defendant.

[YOUNGER J. referred to *In re Barnby's, Ld.* (1)]

That case is distinguishable. There the assets had not, as here, been realized, and there was no winding up.

The payment by the trustees to the defendant was not made under any mistake of fact. The moneys having been distributed, the liquidator's right to them is gone, and there is now no one who can properly be made plaintiff in an action to recover them.

E. W. Hansell was not called upon to reply.

YOUNGER J. stated the facts and continued: It is not disputed that the rate is due by the plaintiff company; that it was properly made; that it was properly apportioned; or that the sum due is 127*l.* 4*s.* 5*d.* It is also not in substance disputed, and it has been proved in evidence, that the liquidator has in fact received a sum of 88*l.* 17*s.* 2*d.* and has applied it in payment of the costs and expenses of the winding up, and that he has in his hands a balance of 1*l.* 8*s.* and no more. The sum which he has so applied was not covered by the security, but was paid by the contributories to the liquidator in respect of their liability under the memorandum of association. The result, therefore, is that with the exception of 1*l.* 8*s.* the liquidator has no moneys now in hand. He accordingly in the name of the plaintiff company, the plaintiff corporation being joined as co-plaintiff, sues the defendant for that sum of 127*l.* 4*s.* 5*d.* which he says remains payable by him. Whether it is so payable depends upon s. 209 of the Companies (Consolidation) Act, 1908, which provides in sub-s. 1 that "In a winding up there shall be paid in priority to all other debts—(*a*) all parochial or other local rates due from the company at the date hereinafter mentioned . . . ." It is, as I have

(1) [1899] W. N. 103.

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said, conceded that the amount due under that description by the plaintiff company to the plaintiff corporation was 127*l.* 4*s.* 5*d.* Then the section goes on to provide in sub-s. 2: "The foregoing debts" (of which the debt in the present case is one) "shall"—I need not read clause (*a*)—"(*b*) In the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge." Sub-s. 3 is: "Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them." The effect of these sub-sections read together appears to me to be that the costs and expenses of the winding up of the company are payable out of the assets of the company not comprised in the debenture security before any payment is made by the liquidator in respect of what may be called preferential debts. But if the general assets after discharge of the costs and expenses of the winding up are insufficient for the payment of these preferential debts, then to the extent to which they are insufficient the amount must be made up by the debenture-holder whose security creates a floating charge upon the property of the company out of the property comprised in or subject to that charge, or in other words, whether a creditor be an unsecured creditor or a debenture-holder whose only security is that of a floating charge, he is equally to be postponed in respect of any claim of his against the assets of the company until those preferential debts have been paid, but the free general assets must be exhausted before recourse is had to the assets charged.

Now the defendant in this case is the only debenture-holder. He has, as he admits, received, as the result of a sale of which he approved, this sum of 1473*l.* 10*s.* 3*d.*, which is more than sufficient to meet the claim of the plaintiff corporation. The liquidator has only a sum of 1*l.* 8*s.* of general assets in his hands to meet this claim, and accordingly it appears to me that, apart from a technical question to which I will refer, the debenture-holder is liable to make good to the plaintiffs, as money in his hands realized from property

comprised in or subject to his floating charge, the amount which is claimed in this action less that sum of 1*l.* 8*s.*

It is, however, suggested by Mr. Harold Simmons, who very properly took every point he could on behalf of the defendant, that the action is improperly constituted. First, as regards the defendant, he said that the only persons who would be proper defendants to the action, assuming it to be otherwise maintainable, were the trustees who had in fact received the sale moneys and who had parted with them, and that in an ordinary case it would be extremely inconvenient, if not impossible, after such moneys had been distributed amongst debenture-holders, to make all of them defendants in an action like the present, a consideration going to show that this defendant is not the proper defendant. I agree that in an ordinary action it would be desirable that the receiver for debenture-holders or the trustees, or whoever were the persons who actually conducted the sale, should before distribution of the proceeds amongst the debenture-holders be required to make good a prior claim, such as this, and in nine cases out of ten that would be done; in fact, such persons would dispose of the money to others at their own risk, in view of a claim which they must be taken to have notice of from the mere existence of the liquidation. But in the present case it seems to me it would have been the merest formality to make the trustees defendants to this action, because they were bound to, and I have no doubt did, act in all respects under the direction of the defendant, who was the sole debenture-holder, and because the defendant, as the sole debenture-holder, admits that he has in point of fact received from the trustees more than enough to meet this claim out of the property comprised in the security. Accordingly it appears to me that in this case the defendant is the proper defendant and the only reasonably proper defendant to the action.

Then it is also said that there is a difficulty as to who the plaintiff ought to be. It is suggested that the plaintiff company is not the proper plaintiff because the money is not due to it; and also that the plaintiff corporation is not a proper plaintiff because there is no obligation on the part of the defendant to make payment of the money to it. That point is taken by Mr. Harold Simmons quite frankly with a view to the conclusion that in a case

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like the present there can be no proper plaintiff, and, therefore that there can be no proper claim. I do not think that the Act has reduced the Court to such a position. It appears to me that in the present case either the plaintiff company or the plaintiff corporation is the proper plaintiff. Perhaps they are not both necessary plaintiffs, but one or other of them is the proper plaintiff to make the claim in this action. My own view would be that in an ordinary case the company is the proper plaintiff, because where there are more claimants than one in respect of preferential payments the Act provides that those payments are to be made and distributed rateably amongst the claimants. I think it would be extremely inconvenient in nearly every case for anybody other than the company, suing of course at the instance of the liquidator, to be plaintiff, because when money is received it then becomes the duty of the liquidator in the winding up to make the rateable division prescribed by s. 209, sub-s. 2 (*a*). The other alternative would render it necessary for each of the preferential claimants to maintain a separate action against persons in the position of the defendant here, a necessity equally burdensome to the claimants and the defendants, especially in cases where the plaintiffs were working men, or persons making claims in respect of wages, or salaries or the like.

Therefore in my view the proper plaintiff is the plaintiff company, and the plaintiff company has come here to make the demand. But if it is not, the only other possible party to come is the plaintiff corporation; and the plaintiff corporation is here too. Under these circumstances I have come to the conclusion that the plaintiffs are entitled to the relief which they seek. I think the proper form of order will be: The plaintiff company not objecting, direct the defendant to pay the 127*l.* 4*s.* 5*d.* less the sum of 1*l.* 8*s.* direct to the plaintiff corporation. The defendant must pay the costs of the action.

Nov. 16. The action having by the direction of the judge been restored to the paper, a discussion took place as to the form of the order.

The order as passed and entered (so far as material) was as follows:—

"This Court doth declare that the debt or sum of 127*l.* 4*s.* 5*d.*

being the proportion of the general rate in the statement of claim mentioned is payable in priority to all other debts in the winding up of the company (other than debts to which priority is given by section 209 of the Companies (Consolidation) Act, 1908, if any) and that the said debt or sum has priority over the claims of the defendant as holder of the debenture in the pleadings mentioned and is payable out of the property comprised in such debenture.

"And the plaintiff company by their counsel not objecting, this Court doth order and adjudge that the defendant do pay to the plaintiffs the mayor aldermen and councillors of the city of Westminster the sum of 127*l.* 4*s.* 5*d.* less the sum of 1*l.* 8*s.* in the hands of the liquidator of the plaintiff company available towards payment of the said rate the plaintiff company by their counsel undertaking that in the event of any further assets of the company (which assets the plaintiff company by their counsel undertake to endeavour to collect) coming to the hands of the liquidator which are not required for payment of any debt or claim which by virtue of the said section 209 of the Companies (Consolidation) Act, 1908, has priority over the claim of the defendant as such debenture-holder as aforesaid the company will pay them to the defendant.

"And it is ordered that the defendant Charles Francis Chapman do pay to the plaintiffs the mayor aldermen and councillors of the city of Westminster and the United Travellers Club Company Limited their costs of this action to be taxed by the taxing Master."

Solicitors: *Allen & Son; G. R. Cran.*

W. I. C.

YOUNGER J.
1915
Dec. 7.

In re WHITE.
WHITE *v.* WHITE.

Applied. *In re* CHAPLIN, DECD. [1950] 1 Ch. 507

[1915 W. 922.]

Will—Construction—Bequest—Furniture and all other Articles of Personal, Domestic, or Household Use—"Carriages"—Motor Car.

Testator by his will bequeathed to his two daughters all his "furniture, plate, plated articles, linen, glass, china, books (except books of account), pictures, prints, stationery, musical instruments, articles of virtu, and all other articles of personal, domestic, or household use or ornament belonging to me, and all my horses, carriages, harness, saddlery and stable furniture."

At the date of his will the testator possessed horses and carriages, but no motor car. After the date of his will he sold his horses and carriages and purchased a motor car which belonged to him at his death:—

Held, that the motor car did not pass under the gift of "carriages" but passed under the gift of "furniture and all other articles of personal, domestic, or household use" to the testator's two daughters.

In re Hall (1912) 107 L. T. 196; [1912] W. N. 175, followed.

In re Ashburnham (1912) 107 L. T. 601; [1912] W. N. 234, commented on.

Denholm's Trustees v. *Denholm*, 1908 S. C. 43; 45 S. L. R. 32, approved but not followed.

ADJOURNED SUMMONS.

Sir Edward White, by his will dated December 24, 1908, after appointing executors and trustees thereof and empowering them to keep up his residence and the furniture and household and domestic effects therein for a year after his decease, made the following bequest: "I bequeath all my watches, jewels, trinkets, personal ornaments, and wearing apparel, and all my furniture, plate, plated articles, linen, glass, china, books (except books of account), pictures, prints, stationery, musical instruments, articles of virtu, and all other articles of personal, domestic, or household use or ornament belonging to me, and all my horses, carriages, harness, saddlery and stable furniture unto and equally between my daughters living at my decease." The testator then bequeathed certain annuities, and devised and bequeathed the residue of his real

and personal estate to his trustees upon trust to sell and convert and to hold the proceeds upon trusts for the benefit of his children and their issue.

The testator made two codicils to his will dated respectively March 23, 1911, and September 9, 1913, which confirmed his will but did not expressly affect the specific bequest to his daughters. He died on June 4, 1914, leaving two daughters surviving him.

At the date of his will the testator possessed horses and carriages, but no motor car. After the date of his will, but before the date of the first codicil thereto, he sold his horses and carriages and purchased a motor car, which, with its accessories, belonged to him at his death. The motor car was used by the testator as a private carriage for the convenience of himself and the persons resident in his house. At the date of his death he was not possessed of any other carriage.

This was an originating summons taken out by the trustees for the determination of the question (inter alia) whether upon the true construction of the will the specific bequest therein contained to the testator's daughters living at his death extended to and included the motor car and motor car accessories belonging to the testator at his death, or whether they passed under the gift of the testator's residuary personal estate in the will and codicils.

The summons was heard by Younger J. for Astbury J.

Horace Freeman, for the plaintiffs.

H. S. Preston, for the specific legatees. The motor car was a carriage and passed to the testator's two daughters under the specific gift of " carriages " in the will : *In re Dennis* (1) ; *Denholm's Trustees* v. *Denholm.* (2) *In re Hall* (3), in which Parker J. held that a motor car did not pass by a gift of " all my carriages, horses, harness, and stable furniture and effects," ought not, it is submitted, to be followed. The gift in the present case is in wider terms than the gift in that case. *In re Hall* (3) was distinguished by Swinfen Eady J. in *In re Ashburnham* (4) on the ground that it only decided that the particular collocation of words in which the word

(1) (1908) 24 Times L. R. 499.
(2) 1908 S. C. 43 ; 45 S. L. R. 32.
(3) 107 L. T. 196 ; [1912] W. N. 175.
(4) 107 L. T. 601 ; [1912] W. N. 234.

YOUNGER J. 1915 WHITE, *In re.* WHITE v. WHITE.

"carriages" was used in the will in that case showed that the testator intended to give only horse-drawn carriages.

If, however, the Court is against me on that point, then it is submitted that the motor car passed under the words "furniture and all other articles of personal, domestic, or household use." In *In re Howe* (1) Eve J. held that motor cars passed under a gift of "household furniture and effects." See also *In re Ashburnham.* (2)

Humphrey H. King, for some of the residuary legatees. The decisions in *In re Howe* (1) and *Denholm's Trustees* v. *Denholm* (3) went upon the ground that the persons who were to have the carriages were to have the testator's house also, and that the intention of the testator was that his mode of living was to be continued by his legatees and that they were to have everything necessary for that purpose. It cannot be suggested that stable furniture includes motor accessories. I rely upon *In re Hall.* (4)

In *In re Platt* (5), where a gift similar to that in the present case followed other gifts of a specific number of horses, carriages, and sets of harness, Kekewich J. held that a motor car passed under a gift of residue.

I admit that a motor car is a carriage for taxing purposes.

H. B. Edge, for infant residuary legatees. I adopt the same contention. In the present gift the word "effects" is not used. In *Denholm's Trustees* v. *Denholm* (3) the house itself was given to the legatee with the furniture and "plenishing."

YOUNGER J. referred to the terms of the gift and continued: The question is whether a motor car passed as a specific gift to the testator's daughters either as a carriage or as an article of personal, domestic, or household use. At the date of the will the testator possessed horses and carriages, but no motor car. After the date of his will he sold his horses and carriages and purchased a motor car. Subsequently he made two codicils by which he confirmed his will. Under these circumstances the first question is whether the motor car passes under the gift of "carriages." Apart from authority I should have thought that the word "carriage" would

(1) [1908] W. N. 223.
(2) 107 L. T. 601; [1912] W. N. 234.
(3) 1908 S. C. 43; 45 S. L. R. 32.
(4) 107 L. T. 196; [1912] W. N. 175.
(5) *The Times*, April 20, 1907.

have included a motor car: there is nothing to qualify it, and I think the judgment of the First Division of the Court of Session expressed by Lord Dunedin in *Denholm's Trustees* v. *Denholm* (1) would support that view. But a Scotch case is not a binding authority in an English Court, and I find that the matter has been discussed and dealt with in England in *In re Hall* (2) by Parker J., in which his Lordship, construing a will not substantially different from the present, held that, having regard to the collocation of words in which the word "carriages" appeared, the testator meant to give only such carriages as were used in connection with horses, harness, and stables, and that a motor car did not pass by such a bequest. The matter was again referred to by Swinfen Eady J. in *In re Ashburnham* (3), in which his Lordship, dealing with *In re Hall* (2), said that that was a decision based entirely on the collocation of words in which the word "carriages" was used in the will in that case, and that it was clear that the testator only intended to give such effects as were ejusdem generis with carriages—i.e., horses, harness, and stable furniture—and for that reason the motor car had been held not to pass. I am not quite sure that Swinfen Eady J. has been correctly reported in the *Law Times* reports, because the reasoning of Parker J. is somewhat different from that there attributed to him, but I think it is clear that Swinfen Eady J. would have decided *In re Hall* (2) in the same way as it was decided by Parker J. We have, therefore, the opinions of two English judges of great eminence that under a collocation of words not substantially differing from those in this will a motor car will not pass under a gift of "carriages." I feel compelled to accept these opinions and to hold that the motor car here does not pass under that part of the gift.

There remains, however, the question whether the motor car passes under the words "furniture . . . . and all other articles of personal, domestic, or household use or ornament," and I think it does. It was urged by Mr. King that in the cases cited with regard to the effect of such words the gift included the testator's house as well as the household effects, and he argued that the Court

(1) 1908 S. C. 43; 45 S. L. R. 32.
(2) 107 L. T. 196; [1912] W. N. 175.
(3) 107 L. T. 601; [1912] W. N. 234.

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presumed from that circumstance an intention that the legatees should have all the effects necessary to enable them to occupy the house in the same state as the testator had done, and that it was upon that ground that a motor car was in those cases held to be included in such general words.

It seems to me that that is too narrow a view to take of those decisions, and I think it is sufficiently plain on this will that the testator did intend that his daughters should have everything represented by the Scotch word "plenishing," not only in his house, but generally. I think I should be defeating his intention if I did not decide that the general words here used are sufficient to include the motor car.

It is satisfactory to hold that there is no rule of construction which prevents the Court from answering this question in the way in which it seems certain this testator, although possibly on a different ground, would himself have answered it could it have been put to him.

Solicitors: *Lithgow & Pepper; John Bartlett & Sons.*

W. I. C.

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[1914 A. 815.]

Local Government—Isolation Hospital—Hospital Committee—Control by County Council—Power of Council to vary Representation of Constituent Local Authorities — Isolation Hospitals Act, 1893 (56 & 57 *Vict. c.* 68), *ss.* 9, 10, 18, 20—*Interpretation Act,* 1889 (52 & 53 *Vict. c.* 63), *s.* 32, *sub-s.* 3.

In 1897 the defendant council, acting under the provisions of the Isolation Hospitals Act, 1893, made an order constituting a hospital district, directing an isolation hospital for that district to be established, and determining the proportions in which the several constituent local authorities (including the relator plaintiff council) were to contribute to the expenses. The same order provided for the formation of a hospital committee, and gave directions as to the number of the committee and of the representatives thereon of each of the constituent local authorities and of the defendants (the relator plaintiffs having one representative and the defendants two), and as to a number of matters relating to the election, rotation, and qualification of members, and other details.

The committee thus constituted discharged their duties until 1914, when differences arose between them and the defendants on questions of policy, and on January 22, 1914, the defendants, claiming to act under the powers conferred by s. 32, sub-s. 3, of the Interpretation Act, 1889, made a further order directing that in lieu of the scheme of representation adopted in the order of 1897 there should in future be a fresh scheme under which the defendants' representatives, thereby increased to nine, would have an absolute majority on the committee and be able to control its policy. The relator plaintiffs objected to this alteration, which (inter alia) reduced their representation on the committee, allowing them only one representative jointly with another constituent local authority, and they commenced this action to test the validity of the order of 1914.

Sargant J. held that the order of 1914 was ultra vires and invalid :—

Held by Bankes L.J. and Warrington L.J. (Lord Cozens-Hardy M.R. dissenting), that upon the true construction of the Isolation Hospitals Act, 1893, the hospital committee was not intended to be independent of the county council; that s. 32,

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sub-s. 3, of the Interpretation Act, 1889, applied; that the defendants had acted within their statutory powers in making the order of 1914; and that that order was valid.

Decision of Sargant J. reversed.

APPEAL from a decision of Sargant J., from whose considered judgment the following statement of facts is taken:—

"By an order (hereinafter called 'the order of 1897') dated April 14, 1897, and made by the Derbyshire County Council under the powers of the Isolation Hospitals Acts, 1893 and 1901, it was amongst other things provided as follows: By article 2 certain districts in the county of Derby, therein referred to as the constituent districts, and including the Baslow and Bubnell urban sanitary district, were formed into a united district, to be styled 'the Haddon Joint Hospital District,' for the purpose of the provision, maintenance, and management of an isolation hospital or hospitals under the Isolation Hospitals Act, 1893 (hereinafter called 'the Act of 1893'), for the reception of patients suffering from infectious diseases in the constituent districts.

"By article 3 the governing body was to be the hospital committee, to be called 'the Haddon District Hospital Committee,' and by sub-section 1 of that article was to consist, subject to sub-section 2 of the article, of fifteen members, of whom two were to be elected by the Derbyshire County Council and the remaining thirteen were to be elected by the respective councils of the constituent districts in numbers roughly proportioned to the respective populations of the constituent districts, the relators, the Baslow and Bubnell Urban District Council, electing one member. The same sub-section also provided that a readjustment of the number of representatives might be made after the publication of the census returns by the agreement of all the constituent authorities, or, in the event of their not agreeing, by the county council after representations made to them by petition by any one of the constituent authorities.

"Article 2 also provided, by sub-section 2, that, if permanent isolation hospitals were not erected to the satisfaction of the Derbyshire County Council under that order within a period of five years from the date thereof, then, if the county council by resolution so determined, the hospital committee to be formed as

aforesaid should cease to hold office and a new committee should forthwith be formed and come into existence at the expiration of twenty-eight days from the date of such resolution of the county council, such committee to consist of nineteen members, of whom nine were to be elected by the constituent authorities and ten were to be elected by the Derbyshire County Council.

"Articles 4 to 9 merely contained various formal provisions, as indeed did most of the remaining articles of the order; and there are only two more articles to which I need particularly refer, namely, articles 16 and 18. Article 16 provided for all expenses, with certain exceptions immaterial for the present purpose, being defrayed out of a common fund to which the constituent authorities were to contribute in certain proportions, no contribution being required to be made by the Derbyshire County Council. Article 18 provided that if the hospital committee made default in repaying any advances made to it by the county council, then the county council might determine that the hospital committee should cease to hold office and their place be filled by a committee elected under article 3, sub-section 2, until repayment were made."

Article 21 provided that the hospital committee should be entitled to receive from the county funds a grant in accordance with the terms of the report of the public health committee to the county council, dated December 18, 1894, upon producing and handing over the certificates of the county medical officer of health and the county surveyor, for the time being, of the county of Derby, that any hospital built had been erected to their satisfaction.

"It is admitted that since their constitution the hospital committee have provided a hospital of, I think, some eight beds for small-pox, which has never in fact been used; and it is said that they have made arrangements with the trustees of another hospital for the use of some six beds for scarlet fever cases, and have taken various steps, that have hitherto proved fruitless, towards providing other hospital accommodation. It is also admitted that the county council have made some voluntary contribution—though not a contribution under any obligation or requirement in the order of 1897—to the funds of the small-pox hospital. But it is unnecessary to consider exactly what has been done, or whether what has been done is sufficient.

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"Undoubtedly, a considerable, and I assume an honest, difference of opinion has arisen between the majority of the hospital committee and the county council. The county council have taken the view, rightly or wrongly, that the hospital committee have been in default in the performance of their duties, and that it is desirable that their constitution should be altered so as to invest the county council with the controlling voice on the committee.

"The county council, however, for this purpose did not think fit to take advantage of the provisions of article 3, sub-clause 2, of the order of 1897, possibly entertaining some doubts as to the validity of that sub-clause. But in lieu thereof they purported to make very sweeping alterations in the order of 1897 by the new order next hereinafter stated.

"By the Haddon District Hospital Committee (Regulations) Order, 1913 (hereinafter called 'the order of 1914'), being an order dated January 22, 1914, and purporting to be made under the same powers as the order of 1897, after reciting, amongst other things, that the county council had, by the order of 1897, formed the Haddon Joint Hospital District, and that the order of 1897 contained regulations for the election, rotation, and qualification, and other matters relating to the constitution of the committee of the said district, and after reciting that the committee had provided a small-pox hospital but no other hospital, and that the county council were contributors to the funds of the said hospital; and after reciting that by the Interpretation Act, 1889, s. 32, provision is made enabling the county council to rescind, revoke, amend, or vary the regulations before referred to, the Derbyshire County Council, purporting to act in pursuance of the powers possessed by them in that behalf, did thereby order and direct as follows, amongst other things, namely (clause 1): From thenceforth the Haddon District Hospital Committee was to be constituted in accordance with the regulations in the schedule thereto, and those regulations were to apply to the election, rotation, and qualification of the members of the said committee and to all other matters provided for by those regulations. (Clause 2) After the commencement of that order on the 1st day of March, 1914, clauses 3 to 9 inclusive and clause 18 of the order of 1897 were rescinded; and (clause 3) the order of 1914 was to come into force on the 1st day of

March, 1914, except as to certain provisions which were to come into operation earlier. By the schedule to the order of 1914 it was, amongst other things, provided that the hospital committee should consist of fifteen members, of whom six were to be elected by the authorities of the constituent district and nine were to be elected by the Derbyshire County Council. The Baslow and Bubnell Urban District Council were, in lieu of electing one member as provided for by the order of 1897, to be associated with the Bakewell Urban District Council in the election of one member.

"The present action is brought on the relation of the Baslow and Bubnell Urban District Council and seeks the following relief:—(1.) A declaration (*a*) that the relators are entitled to have one representative upon the hospital committee of the Haddon Joint Hospital District, (*b*) that the defendants are entitled to have two representatives and no more upon the said committee, (*c*) that the hospital committee constituted in accordance with the provisions of clause 3, sub-clause 1, of the order of 1897 is the committee according to law of the said hospital district, and (*d*) that the provisions contained in clause 3, sub-clause 2, of the order of 1897 and the provisions contained in the order of 1914 are all ultra vires and of none effect; and (2.) an injunction restraining the defendants from forming or causing to be formed a hospital committee in accordance with the provisions of the order of 1914 and from attempting to give effect to the same and from displacing or dissolving or otherwise interfering with the said hospital committee constituted in accordance with the provisions of clause 3, sub-clause 1, of the order of 1897 or with the members thereof."

The action came on for hearing before Sargant J. on July 2, 1915, when judgment was reserved, and on July 30 his Lordship delivered the following written judgment.

SARGANT J., after stating the facts as above set out, continued: The title of the plaintiff to relief really depends upon the question whether the provisions as to the constitution of the hospital committee in the order of 1897, and particularly those contained in clause 3, sub-clause 1, thereof, are fundamental parts of the order and only alterable in accordance with s. 20 of the Act of 1893, and by a method which has not in fact been pursued, or whether

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these provisions of the order of 1897 are merely regulations within the words "rules, regulations, or byelaws" in s. 32, sub-s. 3, of the Interpretation Act, 1889, and as to which no "contrary intention" is shown so as to prevent their being alterable at the pleasure of the county council. To solve this problem it is necessary to look carefully at the language of the Act of 1893.

By s. 3 of that Act the council of a county may on application provide or cause to be provided an isolation hospital. There are two clear alternatives which are kept distinct throughout the Act, and of which the second has been adopted in this case. Sect. 4 provides as to who may make application "for the establishment of an isolation hospital"; ss. 5 to 7, inclusive, provide for the method of application and of holding an inquiry as to the necessity for the establishment of an isolation hospital; and s. 8 contains provisions for the variation of the district proposed to be constituted into a hospital district and for an appeal to the Local Government Board. These provisions, however, are not of importance for the present purpose, since counsel on both sides agreed that they only operated in the interval between the application and the conclusion of the inquiry and were exhausted in the present case on the making of the order of 1897. Sect. 9 provides that on the conclusion of a local inquiry by the county council as to the necessity for the establishment of an isolation hospital the county council shall make an order either dismissing the petition or constituting a hospital district and directing an isolation hospital for such district to be established. These are the only two alternatives. Sect. 10, sub-s. 1, is very important and runs as follows: [His Lordship read s. 10, sub-s. 1, and continued.] Sect. 18 provides that the general expenses incurred by a hospital committee under the Act of 1893, where the hospital district consists of more than one area, shall be paid out of a common fund, to which all receipts shall be carried and to which the local authorities in the district shall contribute in such proportions as the county council by their order constituting the district may determine. Sect. 20 provides that a county council may, on the application of a committee and with the assent of any local authority concerned in such alteration, alter any order made by them for the establishment of a hospital.

The strength of the defendants' case is in the use of the word

"regulations" in s. 10, sub-s. 1, of the Isolation Hospitals Act, 1893, and in the fact that the terms of the qualification to the third sentence of that sub-section seem to imply that the regulations in question may extend to fixing so vital a matter as the constitution of the hospital committee. It is said that the word "regulations" must have been used advisedly and in view of the use of the same word in s. 32, sub-s. 3, of the Interpretation Act; and, further, that it was obviously desirable that county councils should have the power of altering even some of the main features of the constitution of a hospital committee, as for instance in the event of a considerable alteration in the relative populations of the various constituent areas. The argument is a straightforward and intelligible one and has considerable attraction at first sight, and it is obvious that the recitals in the order of 1914 are most carefully framed for the purpose of supporting and justifying the validity of the order of 1914 on these grounds. But there are several counter-arguments which appear to be of at least equal force. In the first place, assuming that the regulations under s. 10, sub-s. 1, extend to the constitution of the committee, and that the words of qualification in the sub-section extend in sense as they do in grammar to the words of the third sentence only and not also to the words of the second sentence of the sub-section (a question as to which I have some doubt), yet nevertheless, so far as the constitution of the committee is concerned (the very point mainly in issue here), the regulations are subject to an appeal to the Local Government Board, who may "modify the constitution of any committee so formed by the county council." These last words seem to me to apply more naturally to the original constitution of the committee than to any change therein that may be subsequently proposed by the county council; and further it would seem unlikely that an appeal of this kind would be given unless the subject-matter were something that was being proposed as a permanency by the county council and not something that could be altered by them from time to time.

Again, it would seem that an order establishing a hospital under the Act of 1893 must at least provide for (1.) the constituent areas, (2.) the numbers of the persons to compose the hospital committee as representing the constituent areas and (if that is the case) the

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county council, and (3.) the proportions in which the constituent areas and (if that is the case) the county council are to contribute. The Act in ss. 11 and 18 expressly recognizes the first and third of these provisions as necessary parts of the order, and I think that the second of these provisions is equally important, and that without it the necessary skeleton or framework of the establishment of a hospital cannot be said to have been completed. Indeed the representation on the committee and the proportions in which the funds are to be contributed are most closely bound together in the Act.

Further, as regards the desirability of a county council being able, in the case of a change in relative population, to alter the proportions in which the constituent areas are to contribute (the instance selected by Mr. Ryde in his argument for the defendants), it is to be observed that this is one of the very matters which is contemplated by s. 18 as being determined by the county council's order. And it is certainly a matter in which each of the constituent authorities is " concerned," so that prima facie their consent would under s. 20 be required to an alteration. It may be that the order itself might contain provisions for the adjustment of any grave inequalities that might ensue on a marked change in relative population, so long as such provisions are not in conflict with the terms of s. 20. But it would be quite another thing if a county council were held entitled to alter in this respect the provisions of an order by regulation made at the sole discretion of the council.

And finally I cannot think that the Act of 1893 intended to make the hospital committee so entirely a creature or puppet of the county council as would be the case if the argument of the defendants were to succeed. The hospital committee form a statutory corporation with powers of acquiring and holding land and are composed entirely of persons nominated by public bodies, that is by the local authorities of the constituent areas. If such a statutory corporation should fail to carry out its duties the ordinary means of compelling it to act are available. It is in my judgment difficult to hold that the county council have, without any express words in the Act, power for this or indeed for any other reason practically to dissolve an existing corporation and to reconstitute it in an entirely different manner.

So much for the provisions of the Act in general. In this particular case some assistance may be derived from the fact that it was by order and not by regulation that the county council purported to constitute the Haddon District Hospital Committee. This indeed, though an indication, is not of itself conclusive. And if I could see that an order was in fact divisible, or rather naturally divided itself, into fundamental constitution such as is the proper subject-matter of an order on the one hand and mere subsidiary machinery such as might be the proper subject-matter of "rules, regulations, or byelaws" on the other hand, I should strive hard to deal with the latter part of the order according to the substance of the matter and not according to the form. But I do not see any sufficiently clear line of demarcation here; and so far as such a line is to be found I think that the clauses of the order of 1897 which are sought to be repealed are of the nature of fundamental constitution rather than of subsidiary machinery.

For these reasons I am of opinion that the plaintiff is right and entitled substantially to the relief sought. It will as regards the order of 1914 be sufficient if I declare that the provisions of clauses 1, 2, and 3 of that order are ultra vires and void. The consequence will be that the order of 1897 will stand unaffected by the order of 1914. It will not be necessary at the present time to grant an injunction to give effect to the declaration asked for by head 2 of the plaintiff's claim, but I will reserve liberty to the plaintiff to apply for such an injunction should it become necessary.

As regards head 1 (*d*) of the plaintiff's claim, the defendants have not ever purported to act under clause 3, sub-clause 2, of the order of 1897, nor, as far as I can see, have they ever threatened to do so, nor do I see any reason to apprehend that they will do so. I think, therefore, that it is better not to make any declaration on this point. But as the question has been to some extent discussed before me, I will express my opinion that clause 3, sub-clause 2, of the order of 1897 is bad. I do not think that the county council were entitled thus to give the go-by by anticipation to the requirements of s. 20 of the Act of 1893. And further I think that clause 3, sub-clause 2, infringes the first qualification in s. 10, sub-s. 1, of the Act of 1893, inasmuch as the county council are without the consent of the constituent authorities placing representatives of

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their own on the committee while not contributing within the meaning of the Act to the funds of the hospital.

From this decision the county council appealed, and the appeal was heard on October 26 and 27, 1915.

Ryde, K.C., Tomlin, K.C., and *Naldrett*, for the appellants. There is a clear distinction in the Act of 1893 between the constitution of a hospital district and the establishment of an isolation hospital on the one hand and the regulations for the internal management of the hospital when established on the other hand. The former is dealt with in the first nine sections of the Act, and where an order has been made directing the establishment of the hospital the county council only has power to alter such an order upon the application of a hospital committee and with the consent of any local authority concerned in such alteration (s. 20). Sect. 10 introduces the provisions relating to the making of regulations for the internal management of the hospital and provides (1) for the formation of a hospital committee by the county

(1) Sect. 10, so far as material, is as follows :—

"10.—(1.) When a hospital district has been constituted, a committee shall be formed by the county council. Any such committee may consist wholly of members of the county council, or partly of members of the county council and partly of representatives of the local area or areas in the district, or wholly of such local representatives. The county council shall make regulations for the election, rotation, and qualification, and for all other matters relating to the constitution of any such committee, subject to these qualifications, that where no contribution is made by the county council to the funds of the hospital, such committee shall consist, unless the constituent local authorities otherwise desire, wholly of representatives of the local area or local areas of the district, and that if any local authority within the hospital district feels aggrieved by the mode in which any such committee is constituted, it may appeal to the Local Government Board, and that Board may modify the constitution of any committee so formed by the county council in such manner as the Board think expedient and just.

"(2.) A hospital committee shall have all such powers of acquiring land as are herein-after mentioned, also all such other powers of providing a hospital by purchase or otherwise, and managing and maintaining the same when so provided, as the county council may delegate to them: Provided that the county council

council, which has to make regulations for the election, rotation, and qualification, and for all other matters relating to the constitution of any such committee. These regulations are such as come within sub-s. 3 of s. 32 of the Interpretation Act, 1889 (1), and although the county council has no power except under s. 20 of the Act of 1893 to alter so much of the order of 1897 as relates to the establishment of the hospital, yet we submit that it is entitled to sweep away all the clauses relating to and regulating the formation of the hospital committee and the internal management of the hospital. The hospital committee is only the executive set up by the county council for the carrying on of the isolation hospital, and the council has the right from time to time to prescribe how the committee shall be chosen, and if the committee do not do their duty the county council may remove them and appoint another committee that will, subject always to the right of an aggrieved local authority to appeal to the Local Government Board under the provisions of s. 10, sub-s. 1, of the Act of 1893. That, we submit, is the scheme of the Act.

The constitution of the hospital committee was not, as Sargant J. seemed to think, an essential part of the earlier order, for s. 10 shows that the power to form a committee does not arise until after the hospital district has been constituted. Further, the learned judge thought that representation on the committee was closely bound up with the proportions of contributions, but there is nothing in the Act that links up contribution and representation, except to this extent, that if the county council does not subscribe it has no representatives on the committee, and in the absence of express enactment that exception cannot be read as

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shall retain to themselves the power of inspecting any such hospital, and of raising money by loan for the purposes of such hospital.

"(3.) A hospital committee shall be a body corporate, having a perpetual succession, and a common seal, under such name and style as may be conferred on it by the county council . . . . "

(1) Sect. 32, sub-s. 3: "Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws."

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implying that the Act intends representation to be bound up with contribution: per Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society*. (1) We do not suggest that the council has power to alter the proportions of contribution, and it has not attempted to do it, but has confined the alteration to those matters which are included in s. 10. The contribution of the county council is referred to in s. 21 of the order of 1897; it was not made under s. 21 of the Act of 1893, but under a resolution of the council, and in the circumstances it amounts to a contribution which satisfies the requirements of the Act. It is fatal for the respondents to take the point about the contribution made by Sargant J., because if it is a good point it would invalidate the order of 1897 which they are seeking to support and enforce.

The whole history of the legislation on this subject shows that the Legislature never meant to make the local bodies masters of the situation, but intended to vest the authority in the county councils.

Inskip, K.C., and *Hon. S. O. Henn Collins*, for the respondents. The Interpretation Act, s. 32, sub-s. 3, does not apply to regulations of such a nature as those mentioned in s. 10, sub-s. 1, of the Act of 1893, and even if it does cover them in terms, then there is plainly "a contrary intention" to be found in the Act of 1893.

Sub-ss. 1 and 2 of s. 32 of the Interpretation Act refer to cases where an Act confers a power or imposes a duty, but sub-s. 3 of that section is studiously different, and refers only to a case where a power is conferred and not to a case where a duty is imposed. There is a distinction between conferring a power and imposing a duty, and where there is a duty to make once and for all regulations, as was the case under s. 10 of the Act of 1893 upon the establishment of the hospital, then the regulations so made cannot be altered by virtue of the provisions of the Interpretation Act. The circumstances contemplated by that Act have no reference to the circumstances of the Act of 1893, and sub-s. 3 does not apply to this case.

Under s. 9 of the Act of 1893 it is absolutely necessary for the county council to make an order after the local inquiry has been held, and if the order so made constitutes a hospital district then the hospital committee is one of the fundamentals of the order.

(1) [1897] A. C. 647, 652.

The order must provide for (*a*) the constituent areas, (*b*) the formation of the hospital committee, and (*c*) the proportions in which the constituent areas are to contribute.

[BANKES L.J. The order must (*a*) constitute the hospital district, (*b*) direct the establishment of an isolation hospital, and (*c*) fix the contributions. You want to add a further element and say that it must also include the establishment of a hospital committee. Sect. 10 only provides for the formation of the committee "where a hospital district has been constituted."]

We submit that the order must contain all four elements. It is to be an order enabling a hospital to be established, and that cannot be done unless a hospital committee is also established. The rest of s. 10 supports that view, because there is a right of appeal to the Local Government Board given to any local authority which feels aggrieved by the constitution of the committee, and the Board may modify the constitution of any committee "so formed." That relates back to the words "shall be formed" at the commencement of the section, and contemplates a forming once and for all and an appeal once and for all, implying finality in the forming or modification of the committee, and it must be read in the light of s. 20, which provides for both finality and elasticity. For these reasons "the contrary intention" mentioned in sub-s. 3 of s. 32 of the Interpretation Act, 1889, appears in the Act of 1893. The "rules, regulations, or byelaws" referred to in that sub-section relate to matters of mere machinery and do not cover "regulations" of the nature contemplated in sub-s. 1 of s. 10 of the Act of 1893, which deal with the formation of the hospital committee and are fundamental.

The hospital committee may acquire land and provide a hospital by purchase or otherwise (s. 10, sub-s. 2), and is a body corporate having perpetual succession and a common seal (sub-s. 3), and may provide additional hospital accommodation and cottage hospitals. All that shows that, although it is the creature of the county council, the hospital committee is not its agent but has an independent discretion and is not dependent for its continued existence upon the pleasure of the county council.

Ryde, K.C., in reply.

Cur. adv. vult.

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Nov. 8. LORD COZENS-HARDY M.R. This appeal raises an important and difficult question as to the powers of a county council under the Isolation Hospitals Act, 1893. It is necessary to consider both the scheme of the Act and its language.

An isolation hospital cannot be established without a previous local inquiry as to its necessity. On the conclusion of the inquiry the county council are bound to make an order either dismissing the petition or constituting a hospital district and establishing an isolation hospital for such district. The order must define the hospital district and determine the proportions in which the local authorities are to contribute to expenses. There is a limited right of appeal given to a local authority within three months from the date of the order.

When a hospital district has been constituted, which probably means after the order has become absolute and not open to appeal, the county council are bound to "form" a hospital committee, which is a body corporate. The committee may "from time to time" make all necessary rules and regulations for the conduct and management of their hospital and the patients therein (s. 12). The committee may, in addition to or instead of providing a central hospital, establish hospitals in cottages or small buildings or otherwise as it may think expedient (s. 14). The county council apparently have no control over this last power, and all expenses incurred by the committee under s. 14 would have to be provided under s. 18. There is a limited power given to the county council to alter any order made for the establishment of a hospital (s. 20). But it can only be exercised on the application of the committee and with the consent of any local authority concerned. Thus far there seems to be no serious difficulty. But it is contended that under the terms of a part of s. 10, sub-s. 1, coupled with s. 32 of the Interpretation Act, 1889, it is competent for the county council at its own will and pleasure, and without any consent, to alter entirely the constitution of the hospital committee, and even to deprive the local authorities of any representation, in the event of a contribution, however small, being made by the county council. If the words admit of no other construction, of course effect must be given to them.

Sect. 10, sub-s. 1, upon which this appeal turns, is as follows:

[His Lordship read the sub-section and continued:] What are the "regulations" which the county council have a duty, and therefore a power, to make? Do they include such a fundamental matter as the right of the local authorities to have any representation on the committee, or are they limited to what I may call ancillary matters, in the nature of by-laws? Does s. 32 of the Interpretation Act authorize the county council to "rescind, revoke, amend, or vary" these "regulations"? Is there any "contrary intention" appearing in the Act?

It remains to consider the facts of this particular case. In 1897 an order was made by the Derbyshire County Council forming eight districts into a united district, the governing body of which was to be a hospital committee of fifteen. The relators in the present action were to have one representative and the county council two (clause 3). The subsequent provisions of clause 3 I need not refer to, except to state that I think they were ultra vires. It is important to observe that the constitution of the committee is treated as part of the order establishing the united district and not as a "regulation" made by the county council after the district had been constituted.

The committee thus constituted discharged their duties until 1914. Different views of policy prevailed latterly between the committee and the county council, and the county council made an order changing the constitution of the committee, reducing the representation of the relators to half a member, and giving the county council nine instead of two members, thus securing to the county council a clear majority of the whole body. Sargant J. has declared that the provisions of this order to which I have referred are ultra vires and void. I should add that there has not been any appeal to the Local Government Board. Sargant J. has held that the county council do not possess the unlimited power claimed, and that the right of appeal to the Local Government Board given to a local authority is not the only remedy. I agree with the learned judge.

The general scheme of the Act seems inconsistent with the idea that the committee is a mere creature of the county council like any ordinary committee of the county council, and that its members are liable to be turned out of office if their views do not agree with

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those of the county council. The language of s. 10, sub-s. 1, is not what I should have expected if the appellants' contention is correct. It is not regulations "as to the constitution" of the committee and the election, rotation, and qualification of its members. "Relating to the constitution" are words pointing rather to the date when and the mode in which the formation of the committee is completed. "Form" is the word applied to the committee in the beginning of s. 10, by way of distinction from constitution of the district. To borrow language applicable to the House of Commons, the ascertainment of the constituencies is one thing, the arrangement for the election and qualification of members is another thing. The word "election" does not by itself connote the determination of the question whether there shall be one or two members for a particular constituency or no member at all. It seems to me that s. 20 indicates a "contrary intention" and that the Interpretation Act does not justify the action of the county council. Sect. 20 might be applied to the present case.

Upon the whole, but not without hesitation, I think the decision of Sargant J. was correct and that this appeal should be dismissed.

BANKES L.J. The question for determination in this appeal is as to the true construction of the Isolation Hospitals Act, 1893, in reference to the control which a county council has a right to exercise over a district committee. On the one hand it is urged that upon a true construction of the Act the county council retain a control which they are entitled to exercise even to the extent of removing a committee who differ from them on matters of policy. On the other hand it is said that once constituted the district committee are an independent body with whose action the county council have at most only very limited powers of control.

In the present case, putting extreme cases as the result of either the one construction or the other is not of much assistance. Either construction lends itself readily to this process. The answer to the material question for our decision must depend upon the language of the Act itself and the proper inferences to be drawn from that language.

Sect. 9 provides for the making of an order by a county council constituting a hospital district and directing an isolation hospital

for such district to be established. The order here spoken of deals with two separate matters, namely, the constitution of the district and the establishment of the hospital. Both are dealt with in the same order. Sect. 18 deals with the question of expenses where the hospital district consists of more than one local area, and provides for contribution being made to the common fund in such proportions as the county council by their order "constituting the district" may determine. It is not disputed that this expression refers to an order made under s. 9. Sect. 20, upon the construction of which the contest in this case has so largely turned, is in these terms: "A county council may, on the application of a hospital committee and with the assent of any local authority concerned in such alteration, alter any order made by them for the establishment of a hospital." The language here used to describe the order differs from that used in s. 18, but both sections adopt either the one or the other branch of the twofold order contemplated by s. 9.

What the county council have done in the present case is not to alter their original order either as to the constitution of the hospital district or the establishment of a hospital, but they have so altered the constitution of the committee as to place the members of the county council in a substantial majority, and in order to effect that result have decreed that the existing committee shall cease to exist as from a certain date. The formation of a hospital committee is dealt with by s. 10, which provides that where a hospital district has been constituted a committee shall be formed by the county council, who shall make regulations for the election, rotation, and qualification, and for all other matters relating to the constitution of any such committee. It seems plain to me from the language of this section that the statute treats the formation of the committee as something to be done after the hospital district has been constituted, that is to say, after the order contemplated by s. 9 has been made.

It is argued that the formation of the committee must be by order, and that the provisions of the section relating to the making of regulations only apply after the order forming the committee has been made; or, putting the point in another way, that the formation of the committee is a necessary part of the order establishing a hospital. I do not agree with either contention. I

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do not think that the statute can be read as though the omission of any reference to the word "order" in relation to the formation of the committee was accidental; or that the provisions relating to the formation of the committee were inserted in a fresh section, and not included in s. 9, inadvertently; or that the language of s. 20 was selected haphazard and without reference to the provisions of s. 9. If these conclusions are correct, it follows that the order forming a committee, even if it be an order as opposed to a regulation, does not come within the operation of s. 20.

The real question, however, in this appeal seems to me to depend not so much upon the nice distinctions between an order and a regulation as upon whether what the county council have done is opposed to the general intention of the Act, so as to prevent the operation of s. 32 of the Interpretation Act, 1889, which provides for the execution of any power "as occasion arises," and the revoking and remaking of rules, regulations or byelaws "unless the contrary intention appears." On this point I hesitate to express a confident opinion, having regard to the judgment just delivered by the Master of the Rolls. The conclusion, however, at which I have arrived is that the whole scope and intention of the Act was to set up committees which should not be independent of the county councils, but which should be subservient to them, even to the extent acted upon in the present instance of wiping them out of existence should they differ on material points of policy. It is not necessary to go through the provisions of the Act in detail. It is sufficient to indicate some of the main grounds upon which I come to this conclusion.

In the first place, a committee may consist entirely of members of a county council. In the second place, a committee may have delegated to it certain only of the powers of a county council, and these the least important. In either of these cases it appears to me plain that a county council would by forming such a committee necessarily retain supreme control, with its attendant responsibilities; yet the provisions of the Act in relation to committees draw no distinction between these two classes of committees and a committee composed of members representing local authorities or others. The provision with regard to the delegation of powers seems to me material also from the fact that

the Act does not provide for the committees exercising any powers other than delegated powers, and I see nothing in the Act which indicates that powers so delegated cannot at any time be withdrawn. If this is so, the withdrawal of all powers is only in substance bringing about the same result (so far as the committee are concerned) as changing the constitution of the committee. A similar criticism may be applied to that part of the Act which enables a county council to invest a local authority with the powers of a hospital committee.

I find nowhere in the Act any indication that the hospital committees were intended to act independently of the county councils. On the contrary, ss. 11 and 15 point to an exactly opposite conclusion, and such powers as are conferred by ss. 12 and 14 are quite consistent with this view, and are necessary powers to be conferred on hospital committees to whom a free power of management is entrusted by county councils, and are to be exercised by them so long as those powers are continued.

For these reasons I think that this appeal succeeds and should be allowed with costs.

WARRINGTON L.J. The question in this case is whether a county council which under the authority of the Isolation Hospitals Act, 1893, has formed a hospital committee with a certain constitution has power under the same Act subsequently to alter that constitution without the consent of the local authorities interested.

The Act by s. 3 provides that a county council may on such application being made to them and proof adduced as is in the Act mentioned provide or cause to be provided in any district within their county an isolation hospital. Sects. 4 and 5 prescribe the persons by whom and the mode in which application is to be made, and provide for holding an inquiry as to the necessity for the hospital. Under s. 6 the report of the medical officer of health for the county is to have the same effect as an application. Sect. 8 provides that a hospital district may consist of a single local area or two or more local areas, and contains certain other provisions not necessary here to be referred to. Sect. 9, so far as is material, is as follows: "On conclusion of a local inquiry by the county council as to the necessity for the establishment of an isolation

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hospital, the county council shall make an order, either dismissing the petition, or constituting a hospital district, and directing an isolation hospital for such district to be established." I will now read s. 10, which is that on the construction of which the question turns. [His Lordship read sub-ss. 1, 2, and 3 of s. 10 and continued :] Sect. 18 provides that where the hospital district consists of more than one local area all expenses incurred by the hospital committee, with certain exceptions, are to be paid out of a common fund to which the local authorities in the hospital district shall contribute in such proportions " as the county council by their order constituting the district may determine." The only other material section is s. 20, which is as follows : " A county council may, on the application of a hospital committee, and with the assent of any local authority concerned in such alteration, alter any order made by them for the establishment of a hospital."

Sect 32, sub-s. 3, of the Interpretation Act, 1889, is in the following terms : " Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws."

On April 14, 1897, the Derbyshire County Council made an order that certain urban and rural sanitary districts (including the relators the Baslow and Bubnell Urban Sanitary District) should be formed into a united district to be styled the Haddon Joint Hospital District for the purposes of the provision, maintenance, and management of an isolation hospital or hospitals under the Isolation Hospitals Act, 1893, and by clause 16 they determined, pursuant to s. 18 of the Act, the proportions in which the several local authorities were to contribute to the expenses. By the same order it was provided that the governing body should be the hospital committee to be called the Haddon District Hospital Committee, and directions were given as to the number of the committee, the number of representatives thereon of each of the local authorities and of the county council respectively, and as to a number of matters relating to the election, rotation, and qualification of members, and other details. Under these directions

the relators obtained one representative and the county council two.

In 1913 differences of opinion arose between the county council and the committee as to the policy which the latter should pursue in reference to providing an isolation hospital, and the county council on January 22, 1914, made a further order whereby they in substance directed that in lieu of the scheme of representation adopted in the order of 1897 there should in future be a fresh scheme under which the county council's representatives would have an absolute majority on the committee and therefore be able to control its policy. This alteration is objected to by the relators, and at their instance the Attorney-General has brought this action for the purpose of testing the validity of the order of 1914. Sargant J. has made an order declaring it ultra vires and invalid.

The appellants, the county council, contend (1.) that on the true construction of the Act of 1893 the directions in the order of 1897 contained as to the constitution of the committee are regulations only within the meaning of that word as used in the Interpretation Act, 1889, and (2.) that, as no contrary intention appears, they are under the last mentioned Act capable of being from time to time amended or varied, and accordingly that the order of 1914 was made with sufficient authority and is valid and effectual.

The respondent, on the other hand, contends that the directions in question are not mere regulations made under the power to make regulations contained in s. 10, but are an essential part of the order for the establishment of the hospital referred to in clause 9, and are therefore incapable of alteration except under s. 20 of the Act.

In my opinion, on the true construction of the Act, the constitution of the committee is to be treated as something separate and distinct from the constitution of the district and the direction that a hospital be established. These latter matters are those to which ss. 4 to 8 inclusive of the Act are directed, and they are finally dealt with and disposed of by the order referred to in s. 9. Nothing so far has been said about the committee or, of course, its constitution. Sect. 10 begins with the sentence "When a hospital district has been constituted," that is to say, when the several proceedings mentioned in the prior sections have been concluded

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and the local inquiry has shown the necessity for the hospital and the county council have made the order mentioned in s. 9, then, and not till then, are they to take the further steps mentioned in s. 10. They are to form a committee which may consist either wholly of members of the county council, or partly of members of the council and partly of representatives of the local areas, or wholly of such representatives. So far nothing has been said as to the machinery by which the council is to form the committee or determine its constitution within the wide and indefinite lines so far laid down. What is wanting is in my opinion supplied by the next sentence, which I think means this: for the purpose of complying with the general directions just given the council shall make regulations, &c.

Then as to the scope of those regulations. Seeing that no other provisions are made for determining the constitution of the committee and that the words are wide enough to include such determination, I see nothing which would enable the Court to say, as we are asked by the respondent to say, that the regulations must be confined to matters of detail ejusdem generis with election, rotation, and qualification. But even if "all other matters, &c.," can be read as all other matters of the same nature as the foregoing, the respondent's case is not much advanced, for I think the word "election" connotes not merely details as to time and mode of election, but also the bodies or persons by whom the person in question is to be elected. The view I have expressed is supported by the remainder of the sub-section, for the power to make regulations is subject to two qualifications, one of which is that if a local authority feels aggrieved by the mode in which the committee is constituted it may appeal to the Local Government Board, and that Board may modify the constitution of the committee as formed by the council; surely this constitution is that which has been established by the regulations made, under the provision of which the right of appeal is a qualification.

It is true that, if it should be held that a constitution modified on appeal by the Local Government Board is incapable of variation, an anomaly arises, inasmuch as some constitutions would then be capable of variation and others not. But I think the same anomaly would arise if the power of variation is to be sought in s. 20, for

that section refers only to an order of the council and not one of the Local Government Board. On the question whether the Court would hold that a modified constitution cannot be altered by the council I express no opinion, for it has not arisen. Many other provisions of the Act have been referred to, but I can find none which indicates that the true construction of s. 10 is other than that which I have expressed above.

I think, therefore, that the constitution of the committee is to be fixed by what are called "regulations." Does s. 32, sub-s. 3, of the Interpretation Act apply to them? I have endeavoured, after listening to and considering the arguments addressed to us, to find some contrary intention, but fail to do so. It is said s. 32, sub-s. 3, does not apply because it refers to Acts which confer a power only and the Act of 1893 imposes a duty. But if that duty is to be performed by making regulations the Act necessarily gives the power to do so, and I cannot see that it makes any difference that the exercise of the power is obligatory. I think the Legislature used the word in the sense which was in 1893 a technical sense, and it would be dangerous to give it another sense unnecessarily.

On the whole I think the judgment appealed from should be reversed.

The order of 1897 contained a clause 3, sub-clause 2, as to the validity of which a question might well have arisen. On this I express no opinion; the clause has not been acted upon and is in fact repealed by the order of 1914.

Solicitors: *Kingsford, Dorman & Co., for N. J. Hughes Hallett, Derby; Guscotte, Wadham & Co., for Goodwin & Cockerton, Bakewell.*

R. M.

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1915

Dec. 17.

PUDDEPHATT *v.* LEITH.

[1915 P. 2064.]

Mortgage—Shares in Limited Company—Voting Powers retained by Mortgagor—Mandatory Injunction against Mortgagee.

A mandatory injunction will be granted to enforce an agreement by the mortgagee of shares in a limited company to vote in accordance with the wishes of the mortgagor.

Motion with witnesses by order.

The plaintiff was the owner of 2500 fully-paid shares in the London and Cosmopolitan Mining Company, Limited, which she had mortgaged to the defendant, the shares being transferred into his name. The terms of the loan were contained in an agreement dated February 14, 1913, but the Court in these proceedings held that there was a collateral agreement binding on the defendant relating to the voting power in respect of the shares, the terms of which were contained in a letter dated January 20, 1913, sent by the defendant to the plaintiff, as follows: "I should have mentioned to you to-day that your voting rights in virtue of the shares held in mortgage by me during the period of the loan will be untouched. Though the shares will be in my name and my voice may give the vote, I shall give no such vote without first consulting you. I shall vote in all cases, when a vote is necessary, in respect of these shares as you wish me to do. This proviso will not be mentioned in the agreement, but you can preserve this note if you like."

Differences had arisen in connection with the management of the company's business, and at the last general meeting of the company the defendant, who was himself a director of the company, had voted in respect of the mortgaged shares against the wishes of the plaintiff, and was insisting on his right to do so at the approaching general meeting to be held on December 21, 1915.

The plaintiff then brought this action, in which she now moved (1.) for an injunction to restrain the defendant from voting in respect of the shares otherwise than in accordance with the plaintiff's direction, and (2.) that the defendant might be ordered to vote in respect of the shares at any poll to be taken at the approaching

general meeting of the company to be held on December 21, 1915, or at any adjournment thereof, against a certain proposed resolution and to vote in favour of certain other resolutions. By consent the motion was treated as the trial of the action. The only part of the case which calls for a report relates to the claim for a mandatory injunction.

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Romer, K.C., and *Meyrick Beebee*, for the plaintiff, asked for the mandatory as well as the prohibitive injunction.

H. E. Wright, for the defendant. The Court will not grant a mandatory injunction to compel the defendant to vote in a particular manner.

[SARGANT J. Is not the position of the defendant analogous to that of the mortgagee of an advowson who is bound to present in accordance with the directions of the mortgagor ? (1)]

There is authority for granting a negative injunction : *Greenwell* v. *Porter* (2) ; but there is no precedent in the books for granting a mandatory injunction to vote in favour of or against any particular resolution.

Romer, K.C., in reply. The true test is whether the agreement in question is one within the principle of specific performance. None of the exceptions from that doctrine apply to the present case : *Lumley* v. *Wagner* (3) ; and, this motion being treated as the trial of the action, the Court will not hesitate to grant the mandatory injunction claimed. In *Greenwell* v. *Porter* (2) the application was interlocutory, and that is the explanation why a negative injunction only was granted. In *Evans* v. *Wood* (4), where a transferor of shares whose name was still on the register of members sued the transferee to recover a call made after the transfer, and for an indemnity against future liability on the shares, Lord Romilly said : " Of course the plaintiff must act in respect of the shares exactly as the defendant may desire." See, too, the form of the order in that case in Seton on Judgments, 7th ed. p. 2293, where

(1) See *Amhurst* v. *Dawling* (1700) 2 Vern. 401 ; *Gubbins* v. *Creed* (1804) 2 Sch. & Lef. 214, 218 ; *Welch* v. *Bishop of Peterborough* (1885) 15 Q. B. D. 432, cited in Fisher on Mortgages, 6th ed. p. 240, note to par. 458.

(2) [1902] 1 Ch. 530.

(3) (1852) 1 D. M. & G. 604.

(4) (1867) L. R. 5 Eq. 9, 15.

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it was ordered that "the plaintiff in all things relating to the said shares, and at the expense of the defendant, act as the defendant shall reasonably direct, and as if the plaintiff were a trustee for the defendant of the same." In *Hermann Loog* v. *Bean* (1), where the defendant was restrained from giving instructions to the Postmaster-General and was ordered to withdraw a notice which he had already given, Cotton L.J. lays down broadly: "I need hardly say anything about the mandatory injunction being granted. This Court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose." That proposition is directly applicable here.

SARGANT J., after stating the facts and holding that the undertaking to vote in accordance with the plaintiff's wishes contained in the letter constituted a collateral agreement binding on the defendant, continued: In my opinion, therefore, the right of the plaintiff is clear, and the only remaining question is whether she is entitled to a mandatory injunction to enforce her right. It is not disputed that she is entitled to a prohibitive injunction, and in my opinion she is also entitled to a mandatory injunction. Prima facie this Court is bound, as Cotton L.J. said in *Hermann Loog* v. *Bean* (1), to give effect to a clear right by way of a mandatory injunction. There are no doubt certain exceptions from this rule, as in the case of a contract of service, because in such cases it is impossible for the Court to make its order effective, but in *Wolverhampton Corporation* v. *Emmons* (2) a mandatory injunction was granted to compel the defendant to build in accordance with certain plans; and in the present case, inasmuch as there is one definite thing to be done about the mode of doing which there can be no possible doubt, I am of opinion that I ought to grant not only the prohibitive but also the mandatory injunction claimed by the plaintiff, and I make an order accordingly.

Solicitors: *Hatchett Jones & Co.; Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

(1) (1884) 26 Ch. D. 306, 314. (2) [1901] 1 K. B. 515.

A. C.

Distinguished. JACOBSON *v.* LEE.
[1949] 2 All E.R. 517.

In re GREGORY LOVE & CO.
FRANCIS *v.* THE COMPANY.

[1915 G. 279.]

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Dec. 7, 16.

Company—Debenture—Floating Charge—Registered Agreement to give Charge in certain Events—Debenture otherwise than for Cash within Three Months of Winding up—Varying Master's Certificate—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212—*Rules of the Supreme Court,* 1883, *Order* LV., *rr.* 70, 71.

A company being indebted, in respect of an overdraft, to its bankers, L., one of its directors, gave the bankers security on his own property for the overdraft (3000*l.*), and the company in July, 1914, gave L. an agreement that in the event of (*a*) the bankers pressing the company for the overdraft, or (*b*) the bankers calling on L. to redeem the property charged by him, the company would give L. a debenture containing a floating charge on its assets to secure 3000*l.* and interest, and this agreement was registered under s. 93 of the Companies (Consolidation) Act, 1908. One of the events having happened within three months of the commencement of the winding up of the company, the company on February 1, 1915, gave L. a debenture for 3000*l.* and interest, stating that it was given under the agreement and containing the floating charge therein referred to. This was also registered under s. 93. On February 23, 1915, the company passed an extraordinary resolution for voluntary winding up. L. having died, his executors on February 12, 1915, commenced an action against the company for realization of the assets comprised in two debentures for 3000*l.* and 1000*l.* (both cash) given to L. in 1912 and 1913 (the validity of which was not disputed) and the debenture of February 1, 1915, and on February 19 a motion for a receiver was by consent of the plaintiffs and the company treated as the trial, and judgment was given omitting any declaration of charge, but directing accounts and inquiries, in answer to which the Master found that there was owing to the plaintiffs on the three debentures the sum of 7000*l.* and interest. After the Master's certificate had become binding the liquidator in the winding up took out a summons asking that the certificate might be varied by disallowing the 3000*l.* and interest under the debenture of February 1, 1915:—

Held—(1.) that there were special circumstances within Order LV., r. 71, entitling the liquidator to have his summons heard; (2.) that the form of the judgment did not preclude the Court from considering whether the debenture of February 1, 1915, gave an effective charge, having regard to s. 212 of the Companies (Consolidation) Act, 1908; and (3.) that that debenture was invalidated under

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the section by the winding-up resolution; because, (*a*) assuming in favour of L. and his estate that one of the events referred to in the agreement of July, 1914, occurred about February 1, 1915, the plaintiffs' position was not saved by the agreement, as the debenture was so complete a performance of the executory agreement as to leave no obligation or right still subsisting under it, and (*b*), even if that was not so, the agreement gave no present charge, but merely a right to a floating charge, not as at the date of the agreement, but on the occurrence of one of two events, one of which occurred within three months of the winding up.

Observations as to declaring charges in debenture-holders' actions.

CHARLES LOVE, a director of Gregory Love & Co., Limited, in 1912 and 1913 advanced in cash to that company two sums of 3000*l.* and 1000*l.*, for which the company gave him debentures which were duly registered under s. 93 of the Companies (Consolidation) Act, 1908. No objection was taken to the validity of these debentures.

In November, 1913, the company was indebted, in respect of an overdraft, in the sum of 3000*l.* to its bankers, who were pressing for payment but agreed to allow the overdraft to stand if further security was given, and Love thereupon deposited title deeds relating to property of his own with the bankers for that purpose.

On July 21, 1914, the company entered into an agreement or undertaking (under its common seal) with Love, by which it was witnessed that, in consideration of his having deposited his deeds with the bankers as security towards the overdraft of 3000*l.*, the company undertook and agreed with him that "in the event of the said bank pressing the said company for payment of the said present overdraft . . . . or the said bank calling upon the said Charles Love to redeem the said security which he has already given to the said bank as aforesaid, the company will forthwith, on the happening of either of those events, execute in favour of the said Charles Love a further debenture deed charging the undertaking and all the property, present and future, of the company . . . . for securing to the said Charles Love the repayment of the sum of 3000*l.* and interest thereon at the rate of 5*l.* per cent. per annum."

On August 7, 1914, Love registered particulars of this agreement with the Registrar of Joint Stock Companies.

Love having died on January 9, 1915, the company on January 22

received a notice signed by his executors calling on the company to execute in their favour a further debenture, in accordance with the agreement, for 3000*l.*, and the debenture asked for was sealed by the company on February 1, 1915. It purported to be in pursuance of the prior agreement, gave a floating security on the company's property, and was registered under s. 93 of the Act of 1908 on February 11.

On February 12 Love's executors commenced the present action claiming (1.) a declaration that the three debentures issued to Love constituted a first charge upon the company's property therein comprised; (2.) an account of what was due to the plaintiffs under the three debentures; (3.) the appointment of a receiver and manager of the property thereby charged; and (4.) foreclosure and sale.

On February 19 a motion for the appointment of a receiver and manager came on, and on this a judgment was given (prefaced with the words "the plaintiffs and defendants by their counsel consenting to the hearing of this motion being treated as the trial of this action and consenting to this judgment"), whereby the Court ordered to be taken and made "(1.) an account of what is due to the plaintiffs, the sole holders of mortgage debentures issued by the defendant company, under or by virtue of such debentures; (2.) an inquiry of what the property comprised in and charged by the said mortgage debentures consists and in whom the same is vested"; and (3.) an inquiry as to other incumbrances. The judgment then appointed a chartered accountant receiver and manager, adjourned the further consideration of the action, and gave the parties liberty to apply, but it did not contain any declaration of charge.

On February 23, 1915, the company passed an extraordinary resolution that by reason of its liabilities the company could not continue its business, and accordingly that it should be wound up voluntarily, and appointing a liquidator (for whom the liquidator making the application which is the subject of this report was afterwards substituted).

By his certificate in answer to the accounts and inquiries directed by the judgment in the action, dated May 3 and filed May 4, 1915, the Master certified (1.) that there was owing to the plaintiffs on the three debentures given to Love (including that of February 1, 1915) the principal sum of 7000*l.*, with certain interest; (2.) what

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property was comprised in those debentures; and (3.) that there were no other incumbrances affecting that property.

The new liquidator stated that he was unaware of what was going on until May, and in July he served the plaintiffs with a summons in the action asking that the Master's certificate (which had become binding) should be discharged or varied by disallowing to the plaintiffs the principal and interest in respect of the debenture for 3000*l.* dated February 1, 1915.

Martelli, K.C., and *R. Rowlands*, for the applicant.

Romer, K.C., and *H. E. Wright*, for the plaintiffs, took the preliminary objection that, the Master's certificate having been filed, and no application to discharge or vary it having been made within five clear days after the filing, the certificate had become binding under the Rules of the Supreme Court, 1883, Order LV., r. 70, and that the summons was therefore too late and ought to be dismissed.

Martelli, K.C., and *R. Rowlands*. By r. 71 of the same Order, "the judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties." There are sufficient special circumstances in the present case to justify a direction under r. 71, for the judgment was obtained by consent immediately before the commencement of the winding up; the receiver nominated by the plaintiffs was appointed the liquidator in the winding up; and the new liquidator, the present applicant, did not until recently become acquainted with the facts on which his application is based.

SARGANT J. held that there were special circumstances within r. 71 entitling the applicant to have his summons heard.

Martelli, K.C., and *R. Rowlands*, for the applicant. Sect. 212 of the Companies (Consolidation) Act, 1908 provides that "Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent,

be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum." The agreement given to Love in July, 1914, was certainly given more than three months before the winding up commenced, but it gave no charge on the company's undertaking or property ; it only provided for the giving of a charge on the happening of either of two events, and the registration of the agreement under s. 93 of the Act did not make it a charge. Assuming that one of these events happened, and that the agreement then became a floating charge in equity, that charge was given within the three months referred to in s. 212, when the company was insolvent, and is invalid. The debenture which followed is also invalid. The consideration for the agreement and the debenture is not " cash " within the meaning of s. 212 : *In re Orleans Motor Co.* (1) If the transaction is not invalid under s. 212 it is invalid as a fraudulent preference : *In re Jackson & Bassford.* (2)

Romer, K.C., and *H. E. Wright*, for the plaintiffs. There was certainly no fraudulent preference in the present case. The decision in *In re Jackson & Bassford* (2) turned on the fact that the agreement to give the charge was not registered, but here the agreement of July, 1914, was duly registered. In *In re Jackson & Bassford* (3) Buckley J., referring to the legislation which s. 93 of the Act of 1908 replaced, says : " The object of that legislation is that those who are minded to deal with limited companies shall be able, by searching a certain register, to find whether the company has incumbered its property or not. An agreement to give security may be either one of two things. It may be so expressed as to create a present equitable right to a security. If it does that, then . . . . it must be registered . . . . , otherwise it is void as against the liquidator and any creditor of the company. Or it may be so expressed as to be merely an agreement that in some future circumstances a security shall in the future be created. In that latter case, the agreement not creating a present security will not require registration." But he does not mean that such a document as that of July, 1914, does not give an equitable charge,

(1) [1911] 2 Ch. 41. (2) [1906] 2 Ch. 467.
(3) [1906] 2 Ch. 476, 477.

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which, being an agreement to give a debenture, is in equity itself a debenture, and placed Love at once in as good a position as if a debenture had been then and there issued to him. If the agreement was a good charge when it was registered, it cannot be defeated by the company afterwards giving us something which is worthless, assuming the debenture of February, 1915, to be worthless. Moreover, the form of the judgment affirms the validity of all the debentures given to Love, and precludes the Court from considering whether the debenture of February, 1915, gives a valid charge.

Martelli, K.C., in reply. We say (1.) that, even if there was an agreement in July, 1914, to give a charge, a debenture in pursuance of it having been subsequently given, no part of the agreement is left; (2.) that the agreement gave no present charge, but only provided that there should be a charge on the happening of either one of two events, which never happened or happened only within the three months immediately preceding the winding up; (3.) that the agreement, or at any rate the subsequent debenture, was a fraudulent preference.

Romer, K.C. The agreement could not be a fraudulent preference, as it was given more than three months before the winding up. [*In re Hurley's Estate* (1) was also referred to.]

Cur. adv. vult.

Dec. 16. SARGANT J. In this case I have already given my reasons for holding that there are special circumstances within Order LV., r. 71, which entitle the applicant to have his summons to vary heard, notwithstanding that it was issued after the time when the certificate had become binding. The summons has, therefore, now to be dealt with as if it had been issued in due time, except of course as regards the question of costs.

There is, however, a second objection which has been taken, namely, that the form of the judgment affirms the validity of all the mortgage debentures issued to the plaintiffs, and that therefore the Court is precluded from considering whether the third of the plaintiffs' debentures, which I will call "the third debenture," gives an effective charge on the company's assets, having regard to s. 212

(1) [1894] 1 I. R. 488.

of the Companies (Consolidation) Act, 1908, and must proceed on the assumption that such a charge exists for the moneys appearing to be due on the face of the third debenture. Were this view sound, it would appear to follow that the liquidator could not get any relief, however clearly he might be entitled to it on the merits, except by means of some fresh proceeding to set aside the judgment. But I do not think that the view is sound, and that for the following reasons.

The judgment, which is one made by consent on a motion treated as the hearing and is similar in form to orders ordinarily made in actions where the plaintiff is one only of a class of debenture-holders, nowhere declares that the moneys owing under the plaintiffs' debentures constitute a charge on the company's assets, but merely orders, in the most general terms, an account of what is due to the plaintiffs under or by virtue of their debentures, irrespective, so far as the words go, of whether the moneys so due have the benefit of the charge or not. Of course, in the great majority of cases there would be no difference between the amount owing and the amount secured by the charge. And equally, of course, the main object in such cases is to enforce the charge by sale and pay the debenture-holders out of the proceeds of sale, though it may be that in the case of single debentures such as these the plaintiffs might under this form of judgment proceed ultimately to get a personal order for payment, and even an order for foreclosure, as in the case of an ordinary equitable mortgage. But, whatever the ordinary object or course of such a judgment as the present may be, I cannot hold that the applicant or the company he represents is estopped from going into the real facts of the case, unless there is something in the judgment which makes some definite assertion to the contrary of these facts, and such a definite assertion I have not been able to find in it.

Incidentally I may remark that this case shows the advantage of declining to declare a charge in cases where a motion is treated as the trial of the action. And in my opinion companies or their liquidators should not in future consent to such a judgment on motion, except perhaps in cases where it is absolutely clear that an indefeasible charge has been created. It may be otherwise where the plaintiff proves his title to a charge apart from consent,

SARGANT J. as on a hearing or on a motion for judgment in default of defence.

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To recur to the present case, it may be, and I think was, suggested that if the words of the account are to be looked at quite strictly, the Master is only to certify as to the bare debt owing to the debenture-holders (in which case s. 212 of the Act would not apply) and cannot go into the real question as to how much of the debt is secured by charge. I do not agree with this contention, and think that, although there is not enough in the judgment to amount to an estoppel, the Master is justified in ascertaining, for the obvious purposes of the action, what the real amount is that is charged under the three debentures and every of them. But if the suggestion were correct, the only result would be that the plaintiffs' action would be barren down to the present, since there would be no ascertainment of any amount for which any charge in the debentures could be enforced. In any case, however, I think that the matter could, if necessary, be put right by the issue of a summons for a supplementary account or inquiry to bring out the relevant facts, as was done in *Taylor* v. *Mostyn*. (1) And I propose to treat the matter as if Mr. Martelli's client had issued such a summons and the evidence now before the Court had been given on that summons as well as on the actual summons, such evidence being admittedly sufficient for the purpose of both summonses. Mr. Romer, while not consenting to this course, asked that if it were adopted his clients' claim to a charge should not be restricted to such rights as might arise under the third debenture itself, but should extend to any rights they might still have under the agreement under which the third debenture was issued, namely, a resolution of the directors of the company and an agreement or undertaking in pursuance thereof of July 21, 1914. This claim was obviously quite a reasonable one and was not objected to by Mr. Martelli, and I propose to accede to it and determine the position of the plaintiffs under either or both of the documents in question.

Nothing can be clearer than that the floating charge given by the third debenture itself on February 1, 1915, was subsequently invalidated under s. 212 by the winding up of the company on the 23rd of the same month. But Mr. Romer, while expressly conceding

(1) (1886) 33 Ch. D. 226.

this much, urged that there was a subsisting charge in favour of his clients under the agreement of July 21, 1914. This agreement was in the nature of a counter-security from the company to Mr. Charles Love against a guarantee and charge on property given by him to the company's bankers to secure the company's overdraft, and it provided that in the event of the bank pressing the company for the payment of their overdraft, or the bank calling on Mr. Charles Love to redeem the property charged by him, the company would forthwith execute a debenture containing a floating charge on the undertaking and assets of the company to secure 3000*l.* and interest. No specific evidence has been given as to either of the events mentioned in the agreement having actually happened, but I think that the occurrence of one or other of them at or about the time of the execution of the third debenture may fairly be inferred in favour of Mr. Love and his estate.

On these facts it seems to me that it is impossible to hold that the position of Mr. Romer's clients is saved by the agreement in question. In the first place, it is not suggested that the third debenture was not precisely such a document as was contemplated by the agreement; and, this being so, there appears to have been so complete an execution or performance of the executory agreement as to leave no obligation or right still subsisting under it. But even if that is not so, and the plaintiffs are entitled to be put into as good a position as they would have occupied under the agreement had the debenture not been issued, I cannot see that they would be in any way advantaged thereby. The agreement contains no present charge, but merely a right to the plaintiffs' testator to have a charge of a certain kind on the occurrence of either of two events. And an enforcement of the agreement would result in the plaintiffs getting a floating charge—not as at the date of the agreement, but as at the date when the first of the two events happened, which cannot on the evidence be put earlier than the actual issue of the third debenture.

I can understand a person entitled to an executory contract, such as debenture scrip, being put in as good a position as if the contract had been executed by the actual issue of debentures. What I cannot understand is the claim apparently made here, that he shall be put in a better position than if the executory agreement had been carried out in accordance with its terms. The fact is that

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the plaintiffs' testator expressly bargained for a future and contingent charge of such a kind as to be liable to be invalidated in the event of liquidation within three months of its issue. His executors have received precisely the defeasible charge for which he bargained, yet are now seeking to obtain, in excess of the bargain, a charge freed from the element of defeasibility. The view I have taken on this point frees me from the necessity of considering whether, notwithstanding the registration of the resolution, the third debenture could be successfully objected to as a fraudulent preference, as in *In re Jackson & Bassford.* (1)

Having regard to the delay of the liquidator and to the fact that his application to vary has been heard out of time, and by way of indulgence, I do not order the plaintiffs to pay his costs, as I should otherwise have done. There will be no order as to their costs of the summons. The liquidator will no doubt get his costs out of the assets of the company.

I think the certificate had better go back to the Master, having regard to what I have said, and then he will find specifically what was due and owing on the charge on the property under the first and second debentures given to Mr. Love.

Solicitors for the liquidator : *Kenneth Brown, Baker, Baker & Co.*

Solicitor for plaintiffs : *J. Montague Haslip, for Martin & Martin, Reading.*

(1) [1906] 2 Ch. 467.

F. E.

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[1915 J. 827.]

Trade Mark—Registered Seven Years—Action for Infringement—Mark common to the Trade at Date of Registration—Rectification of Register—Combined Trade Mark—Note on Register—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 41.

Sects. 11 and 41 of the Trade Marks Act, 1905, are to be read together. Therefore a trade mark which has remained unchallenged on the register for more than seven years may nevertheless be removed from the register if at the date of its registration it was a mark common to the trade.

A combined trade mark which has been registered for more than seven years is not open to objection solely on the ground that part of it consists of a particular device which was common to the trade at the date of the registration of the trade mark. But if in an action for infringement the alleged infringement is not the user of the trade mark as a whole, but the user of the particular device common to the trade, the action will fail and the proprietor of the combined mark may be required to place a note on the register to the effect that no claim is made for the exclusive use of the particular device.

WITNESS ACTION.

The plaintiffs were millers and corn merchants at Sheffield, and the defendants carried on a similar business at Salford and Bolton.

The plaintiffs were the registered proprietors of a trade mark No. 39,759 registered in class 42 (for cereals, flour, digestive meals, and other similar products of grain used for food) on September 22, 1884, as an old mark used for thirty years before 1875. They were also the registered proprietors of a trade mark No. 247,273 registered in class 42 (for the same goods as their other trade mark) on June 30, 1902. Trade mark No. 39,759 consisted of an oval scroll, the upper half of which contained the device of a wheatsheaf. The lower half was occupied by the capital letters "J. W." Trade mark No. 247,273 was simply a wheatsheaf.

The firm of Joshua Wigfull & Sons was established in 1750 and in 1902 it became a limited company, and the business of the plaintiffs and their predecessors in title was and had been confined to the district of Sheffield, and they had for very many years

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continuously and exclusively used their said trade marks in that district on their sacks to denote their goods. In the spring of 1915 the defendants' goods began to enter the Sheffield district and to compete with the plaintiffs' goods, and the defendants' sacks also bore the device of a wheatsheaf. Correspondence ensued between the plaintiffs and defendants and their respective solicitors, and in May, 1915, the plaintiffs commenced this action alleging that the defendants were using in their said business a mark or device consisting of or including as a principal part thereof a wheatsheaf and that such user was an infringement of their said trade marks and they claimed an injunction and the usual ancillary relief.

The defendants by their defence admitted that they had used upon sacks containing their flour the device of a wheatsheaf, but they denied that such use was an infringement of the plaintiffs alleged trade marks. They alleged (paragraph 2) that they and their predecessors in business had continuously and extensively used openly and without interference or complaint the device of a wheatsheaf upon sacks containing their flour from the year 1880 down to the present time; (3.) that each of the plaintiffs' trade marks was at the date of registration thereof and was now common to the trade, and that they would rely upon the use by traders other than the plaintiffs of the device of a wheatsheaf as a trade mark for flour and other articles of food; (5.) that, having regard to the use by the defendants and their predecessors of a wheatsheaf, neither of the plaintiffs' trade marks was at the date of its registration or at any other time distinctive; and (6.) they would contend that by reason of the matters set out in paragraphs 2, 3, and 5 the plaintiffs were not entitled to the exclusive use of either of the said trade marks as against the defendants, and they would rely on the proviso of s. 41 of the Trade Marks Act, 1905.

The plaintiffs in reply did not admit the user alleged in paragraph 3 of the defence, and alleged that such user (if any) was not from a date anterior to the user by the plaintiffs and their predecessors in business of their trade marks.

It appeared from the defendants' particulars of objections, and was proved in evidence, that the defendants had since 1880 continuously used a wheatsheaf on their sacks and that it was common to the trade.

Kerly, K.C., and *H. B. Vaisey*, for the plaintiffs. Sect. 41 of the Trade Marks Act, 1905, is practically a statute of limitations for a registered trade mark, and after seven years a registered trade mark must be taken to be valid in all respects except in a case of fraud or unless it offends against s. 11. (1) But s. 11 is not directed to anything in the mark itself. That is determined at the time of registration. It is submitted that the section only applies to a deceptive or scandalous mark: *Woodward, Ld.* v. *Boulton Macro, Ld.* (2); *In re Imperial Tobacco Co.'s Trade Marks.* (3) But a trade mark is not calculated to deceive merely because it is common to the trade, and our marks having been on the register seven years it is not now open to the defendants to prove that at the date of their registration they were common to the trade. On our evidence we have had the exclusive use of our 1884 trade mark in the Sheffield district for upwards of sixty years continuously, and we had no knowledge until the defendants' particulars of objections were delivered that the wheatsheaf was common to the trade in the United Kingdom.

(1) The Trade Marks Act, 1905, enacts, s. 11: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design."

Sect. 41: "In all legal proceedings relating to a registered trade mark (including applications under section thirty-five of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of section eleven of this Act: Provided that nothing in this Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connexion with goods upon or in connexion with which such person has, by himself or his predecessors in business, continuously used such trade mark from a date anterior to the user of the first-mentioned trade mark by the proprietor thereof or his predecessors in business, or to object (on such user being proved) to such person being put upon the register for such similar trade mark in respect of such goods under the provisions of section twenty-one of this Act."

(2) (1915) 112 L. T. 1112; 32 Rep. Pat. Cas. 173.

(3) [1915] 2 Ch. 27; 32 Rep. Pat. Cas. 40, 361.

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Colefax, K.C., and *J. Hunter Gray*, for the defendants. Although we cannot prove a user of the wheatsheaf as our trade mark from a date anterior to the user of the plaintiffs', the provisions of s. 11 are still open to us. That section is not confined to cases where the mark is calculated to deceive and matters ejusdem generis, but applies to any mark which at the date of its registration is not entitled to the protection of the Court. The cases cited do not assist the plaintiffs. In the case of *In re Imperial Tobacco Co.'s Trade Marks* (1) Eve J. held that a trade mark properly on the register at the date of its registration is not invalidated by subsequent events over which the owner has no control, but that is not this case. It is clear from our evidence that in 1884 and in 1902 a wheatsheaf was common to the trade, and therefore the registration of the plaintiffs' marks was improper and is not protected by s. 41. Further, a trade mark extends to the whole of the United Kingdom, and cannot be restricted to a particular district.

Kerly, K.C., in reply. We admit that a wheatsheaf was common to the trade in 1902, and if it is open to the defendants to take that objection we admit that that mark cannot be supported. But the 1884 mark is a combined mark and is, we submit, unassailable.

NEVILLE J. The plaintiffs sue the defendants for the infringement of their two trade marks. The date of the registration of the first is September 22, 1884, and of the second June 30, 1902. The earlier trade mark consists of a wheatsheaf, which occupies about the half of an oval enclosure with the letters "J. W." occupying the lower half of the oval. The mark of 1902 is a wheatsheaf pure and simple. The defendants have brought two motions to rectify the register in respect of those marks, and I have to deal with the whole of the litigation between the parties. The parties were millers and dealt in flour, and the evidence before me is conclusive that the use of a wheatsheaf was common to the trade on September 22, 1884, and was common to the trade on June 30, 1902, and is common to the trade at the present time, and the question is whether, under those circumstances, the plaintiffs ought to obtain an injunction against the defendants for using the device of a wheatsheaf in connection with the sale of their goods in

(1) [1915] 2 Ch. 27; 32 Rep. Pat. Cas. 40.

the way in which they have used it since the year 1880. It is said that such an injunction ought to be granted because the plaintiffs have been on the register in respect of both of their marks for upwards of seven years, and that s. 41 of the Trade Marks Act, 1905, precludes the Court from taking into consideration the question whether the mark registered is common to the trade or not. There is this distinction between the two marks: The first is a compound mark, and may well be entitled to protection although the wheatsheaf which occupies part of it is a device which is common to the trade. It does not appear to me that that would be an objection to the trade mark as a whole which could be substantiated. But the plaintiffs sue upon their trade mark of 1884 in respect of the use by the defendants, not of the compound mark or of any appropriation of the compound mark, but of one of the constituents of the compound mark, that is, the wheatsheaf, and in respect of that, subject to the question under s. 41, they clearly could not succeed as soon as it is shown that the wheatsheaf itself is common to the trade.

In my opinion s. 41 is itself in terms subject to a proper construction of s. 11 of the same Act, and what I have to consider is whether a trade mark, which at the date when it was registered and ever since has been common to the trade, is disentitled to protection in a Court of justice. The words of s. 11 are "It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice." I think the reasonable interpretation of that section is that if the trade mark is disentitled to protection in a Court of justice, then, notwithstanding the lapse of seven years,—s. 41 being expressly declared to except any trade mark which offends against the provisions of s. 11—it is not protected by s. 41. In the present case the question is, does the trade mark offend against the provisions of s. 11? In other words, is it disentitled in any way to protection in a Court of justice?

I have been referred to two decisions of Eve J., one of which was taken to the Court of Appeal, and the Court of Appeal expressed no opinion upon the construction which Eve J. put upon the statute, but decided the case upon another ground. But I have the decision

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of a judge of co-ordinate jurisdiction, which I think I am bound to follow if it applies. That decision extends to this, that, if a trade mark is properly registered in the first instance, the fact that subsequent events have placed it in such a position that if the application to register were made to-day it would fail does not prevent the operation of s. 41, so that after seven years it is a good mark and can be sued upon and cannot be removed from the register. But that decision, in my opinion, does not apply to a case where upon the evidence it appears that at the time of the registration of the mark it was a mark which was not entitled to protection in a Court of justice, because it was an attempt on the part of an individual trader to monopolize a device which was the common property of the public, and particularly of those engaged in carrying on the trade in question. What I have to consider here is whether it is a mark which ought to be protected, and as soon as I find that at the time it was registered it was a mark which ought not to have been protected and ought not to have been registered, I am bound not only to refuse an injunction in an action upon it, but also to rectify the register by removing it.

The facts of the case are a little curious and ought to be mentioned, because I do not think that either of the parties have been unreasonable. The difficulty between them arose through mutual ignorance. The use by the plaintiffs of the mark is certainly very old, older than that of any other user which has been proved before me, and the question of prior user on the part of the defendants was not pressed. But the use of the plaintiffs has been purely local, and in their local business they have not come across any of the numerous instances of the use of the wheatsheaf in the trade which have been proved before me. That there were a multitude of such cases the evidence proves beyond controversy, but curiously enough, although Sheffield is not a remote corner of the earth, it does not seem to have been within the ambit of the use of this particular device in the corn trade, and consequently it is not altogether unnatural that when the plaintiffs found their district invaded by a mark similar to their own, having had the mark of a wheatsheaf registered for a number of years, they thought that they were entitled to prevent the user of it by any other person. It has not been seriously argued, and of course it could not be, that there is

such a thing as a district mark. A registered trade mark is a mark for the whole country, and cannot remain on the register merely because in a particular part of the country nobody else has been using the mark. What I have said disposes of the action. I hold that the wheatsheaf was a device common to the trade at the time of the registration of the two marks in 1884 and 1902, and that it is still common to the trade. Under those circumstances I think s. 41 does not protect it although both marks have been on the register for over seven years.

Then I come to the motions to rectify the register. The rectification of the register in respect of the 1902 mark raises no difficulty, because the mark is a wheatsheaf only, which is common to the trade. But that is not true with regard to the mark of 1884. That is a compound mark which I think might well stand although one of its constituents, the wheatsheaf, is common to the trade. But having regard to the use which the plaintiffs have made of that compound mark, and the use which no doubt might be attempted, I think it would not be right to leave that mark upon the register in its present form without notice to the public that by a decision of the Court the wheatsheaf has been held to be common to the trade; and, although I cannot force upon the plaintiffs a disclaimer of that part of their compound mark, I think a note should be put upon the register to the effect that the wheatsheaf has been held to be common to the trade.

[After a short discussion with counsel the order of the Court was settled as follows]:—

The plaintiffs undertaking subject to the leave of the registrar to add a note to the effect that no claim is made for the exclusive use of a wheatsheaf, no order on the motion except that the plaintiffs do pay the costs.

Solicitors: *Peacock & Goddard, for H. & A. Maxfield, Sheffield; Chester, Broome & Griffithes, for Fielding & Fernihough, Bolton.*

H. L. F.

SARGANT J.

1915

Dec. 2.

In re WILSON.

WILSON *v.* CLARK.

[1915 W. 117.]

Dower—Action for Assignment—Claim for Payment of Lump Sum to Doweress out of Purchase-moneys—Gavelkind—Charges on Realty in Respect of Estate Duty paid out of Personalty—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2—*Real Estate Charges Act,* 1854 (*Locke King's Act*) (17 *&* 18 *Vict. c.* 113).

W. died intestate in 1902 whilst seised of lands of gavelkind tenure, and leaving a widow, C., who was entitled to the income of one half of the lands during widowhood for her dower, and an infant daughter, K., who was his heiress. Letters of administration of W.'s estate and also of K.'s estate (when she died in her infancy in 1913) were granted to C., who on W.'s death paid the estate duty on his realty out of his personalty, and therefore as to two thirds of the duty out of that to which K. was beneficially entitled and as to one third out of C.'s share. On the death of K. the defendants were the heirs of W. in respect of the gavelkind lands, which were sold :—

Held, that C. was not entitled against the wishes of the defendants to have a value set on her dower and to have the amount of the valuation paid out of the proceeds of sale of the lands.

In re Hall's Estate (1870) L. R. 9 Eq. 179 ; *Gleeson* v. *Byrne* (1890) 25 Ir. L. R. 361 ; and *Harrop* v. *Wilson* (1865) 34 Beav. 166 distinguished.

Held, also, following *In re Hole* [1906] 1 Ch. 673, that C. was not entitled to have the two thirds of the estate duty paid to her out of the proceeds of sale ; but that she was entitled in respect of the one third of the duty to a charge on K.'s real estate and to have it paid out of the proceeds of sale.

Charles Wilson was at his death, on September 22, 1902, seised of lands at Beckenham in the county of Kent which were of gavelkind tenure (and also of certain lands in fee simple in other places, which are not the subject of this report). He died intestate leaving a widow, Clara Wilson (plaintiff in this action), and a daughter, Clara Kathleen Wilson, who was born on July 17, 1898, and was his heiress-at-law according to the custom of gavelkind, and is below called " the infant."

On November 15, 1902, letters of administration of Charles Wilson's estate were granted to the plaintiff.

The infant died on February 4, 1913, at the age of fourteen years, and letters of administration to her estate were granted to the plaintiff on June 30, 1913.

On this death occurring Emily Louisa Clark and William George Wilson became entitled to the gavelkind lands in moieties as co-heirs of Charles Wilson according to the custom, but subject to the plaintiff's right to receive as dower one moiety of the rents and profits during her widowhood and chastity.

After the death of the infant the gavelkind lands were sold by the plaintiff as administratrix of her husband and the proceeds of sale received.

On the death of Charles Wilson the plaintiff paid (out of the personal estate to which she was entitled as his administratrix) 813*l.* 15*s.* 1*d.* (the estate duty payable on his freehold and gavelkind lands). She brought the present action against Emily L. Clark and W. G. Wilson, and in her statement of claim alleged that she was entitled to have a part of the proceeds of sale of the gavelkind lands assigned to her absolutely in satisfaction of her claim to dower or other widow's estate in such lands, and to have the sum of 813*l.* 15*s.* 1*d.* (estate duty) with interest thereon raised out of the real estate and repaid to her, and she claimed (1.) an inquiry as to the freehold estate of which she was dowable and the proceeds of sale thereof; (2.) "an inquiry what copyhold or customary lands the said Charles Wilson died seised of wherein the plaintiff is entitled to dower or any other estate by the custom of the tenure of such lands and whether any and which of them have been sold since his death, and what has been done with the proceeds of such sale or sales if any"; (3.) "that the plaintiff may be assigned her dower in such freehold lands, and her dower or widow's estate in such copyhold or customary lands or in the proceeds of sale of such of the said lands respectively as may have been so sold"; (4.) "a declaration that the plaintiff" was entitled to one third of the rents and profits of the freeholds since the death of Charles Wilson, "and to such part of the rents and profits of the said copyhold or customary lands as, according to the custom of their tenure, she shall be found to be entitled to in respect of her dower or other widow's estate therein"; (5.) a declaration that the plaintiff was entitled to a charge upon the freehold and customary estates and

SARGANT J. proceeds of sale for the 813*l.* 15*s.* 1*d.* paid for estate duty, with interest since the date of payment, or for a proportionate part thereof respectively; (6.) administration of the real estate so far as necessary.

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Romer, K.C., and *Howard Wright*, for the plaintiff. The plaintiff, as a doweress, has a right to a share, which is one half in the case of gavelkind lands, of the rents and profits from the time of her husband's death, and a separate right to have the dower assigned to her, which is according to the value at the time of the assignment: *Williams* v. *Thomas.* (1) The form of judgment in an action for assignment of dower is given in Seton on Judgments, 7th ed. p. 911, and at p. 913 there is a form containing an inquiry what is due to a widow in respect of her dower. Another form, for the case in which a widow consents to have a value set on her dower, is given at p. 1485 of the same book. In *In re Hall's Estate* (2) it was held that a doweress was entitled to be paid the value of her right of dower out of the purchase-money of the estate. That case was followed in the Irish case of *Gleeson* v. *Byrne* (3); and *Harrop* v. *Wilson* (4) is also an authority in favour of our contention that the widow is entitled, even against the wishes of the heirs, to have a value set on her dower and to have the value paid out of the proceeds of sale of the land. The plaintiff sold the land as administratrix in the course of administration of the estate and thus disposed of two rights, namely, her own right as doweress and the rights of other persons in the land, and an arrangement between those persons and herself must be inferred under which she was to have a lump sum for her dower out of the purchase-money.

The plaintiff is also entitled to a charge as the testator's administratrix on the gavelkind and other landed property of Charles Wilson for the 813*l.* paid by her as estate duty on those properties. On Charles Wilson's death two thirds of his personalty belonged to the infant and one third to the plaintiff, and she is entitled to have the whole of the 813*l.* paid out of the real estate to which the infant was entitled. At any rate she is entitled to a charge in respect of the remaining one third of the 813*l.* on the infant's real estate and

(1) [1909] 1 Ch. 713.
(2) L. R. 9 Eq. 179.
(3) 25 Ir. L. R. 361.
(4) 34 Beav. 166.

to be paid the amount out of the proceeds of sale: Finance Act, 1894, s. 6, sub-s. 2, s. 8, sub-s. 4, s. 22; Land Transfer Act, 1897, s. 5. [They also referred to *In re French-Brewster's Settlements* (1) and *Lord Compton* v. *Oxenden*. (2)]

Martelli, K.C., and *A. St. John Clerke*, for the defendant E. L. Clark. The plaintiff is entitled only to the income of one moiety of the gavelkind lands during widowhood, and her interest is subject to the contingency of her marrying again. She is not entitled to have her interest valued and receive the amount of the valuation out of the corpus. No such valuation is allowed except in the case of an insolvent estate. In *In re Hall's Estate* (3) there was no separate argument on behalf of the infant, and no decision as between the infant and the doweress. *Gleeson* v. *Byrne* (4) was a case in which an insolvent estate was being administered. In *Harrop* v. *Wilson* (5) the only question was as to the person entitled to the dividends up to the death of the doweress. The purchase-money here is simply substituted for the land sold, and there is no authority in support of the plaintiff's contention on this point.

As regards the plaintiff's claim to be recouped the estate duty, it is clear that the plaintiff is not entitled to be repaid the two thirds paid out of the personal estate of the infant.

[SARGANT J. referred to *In re Hole*. (6)]

That is conclusive as to the two thirds. As to the remaining one third, if the plaintiff paid it out of her own money she is entitled to a charge on the realty in respect of it.

[SARGANT J. Is not the real estate subject to the charge under Locke King's Act?]

J. E. Harman, for the defendant Wilson.

Romer, K.C., in reply.

SARGANT J. This is an action for the purpose of the assignment of dower. There are two questions which I have to decide, first with reference to the incidence of estate duty, and secondly whether the plaintiff, who is dowable out of gavelkind lands,—although nothing turns on their being of gavelkind tenure, as the same

(1) [1904] 1 Ch. 713.
(2) (1793) 2 Ves. Jun. 261.
(3) L. R. 9 Eq. 179.
(4) 25 Ir. L. R. 361.
(5) 34 Beav. 166.
(6) [1906] 1 Ch. 673.

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question would arise if they were ordinary freehold lands—is entitled, as against the persons entitled to the lands subject to the dower, to have the capital value of her interest during life or widowhood estimated and paid out of the purchase-money of the gavelkind lands, those lands having in fact been sold.

Charles Wilson, the owner of the lands, died intestate in September, 1902, leaving a widow, who is the plaintiff in this action, and an only child; and in November, 1902, letters of administration to his estate were granted to the plaintiff. There was a net personal estate of something like 10,000*l.* after allowing for duties, and the real estate was of the value of something like 23,000*l.* The only child of the intestate died while still an infant, leaving her mother, the plaintiff, her sole next of kin. Of course, on the death of Charles Wilson the personal estate belonged as to two thirds to his only child, and as to one third to his widow; as regards his ordinary freeholds, the whole interest passed to his only child subject to the widow's right to dower; and a comparatively small part of his land, worth something over 1000*l.*, passed to his only child subject to his widow's right to a half during her widowhood according to the custom of gavelkind. The widow paid the whole of the estate duty on the lands, amounting to about 813*l.*, out of the personal estate, and therefore as to two thirds out of that to which the infant was beneficially entitled and as to one third out of that to which the widow herself was entitled. One question is whether there is any equity, as between the widow who became entitled to the personal estate on the one hand and those who became entitled on the death of the infant to the real estate on the other hand, to have the actual condition of the property of the infant altered by adjusting the matter as if the two thirds of the estate duty had been paid out of the real estate of the infant instead of having been paid, as it was in fact, out of the personal estate of the infant. In my opinion that is completely settled against the widow by the authority of *In re Hole* (1), and I need say nothing more upon that. As regards the other third, the widow, having paid it, was obviously entitled—and that is conceded on the part of those entitled to the real estate—to a charge on the real estate for that amount; and, the infant having

(1) [1906] 1 Ch. 673.

died while that charge was in existence, it seems to me that, even if there were some personal liability on the part of the infant to make good that amount so paid to the widow, yet the provisions of Locke King's Act apply to the case, and the property descends to the real representatives of the infant burdened with that charge. Accordingly the widow is entitled to that amount, and that notwithstanding that she was entitled to the whole of the personal estate of the infant; because in the administration of the real and personal estate of the infant the provisions of Locke King's Act would prevent there being any claim on the part of the persons entitled to the real estate to have the charge discharged out of the personal estate.

Now comes the question as to the rights of the widow in the purchase-money representing the gavelkind lands. The gavelkind lands were sold by the widow as administratrix of her husband for a sum of about 1000*l*. It seems to me that prima facie the rights in the purchase-money would correspond with the rights in the lands themselves, that is to say, that the widow would be entitled to the income during widowhood of one half of the purchase-money instead of receiving half the rents of the land sold. But it is said that there are cases deciding that the widow is entitled as of right, and notwithstanding the opposition of those who were entitled to the real estate, to have her rights in the personalty commuted into a present capital sum to be paid to her, such sum, of course, being computed with reference to the present value of her interest during widowhood; and for that proposition three cases were cited, namely, *In re Hall's Estate* (1), *Harrop* v. *Wilson* (2), and an Irish case of *Gleeson* v. *Byrne*. (3)

I can find nothing in the report of *In re Hall's Estate* (1) to lead me to the conclusion that there was any argument on this point in that case. The purchase-money there in fact represented lands that had been taken by a railway company under its statutory powers. The petitioners were the widow and the infant entitled in remainder, and Malins V.-C. allowed the purchase-money to be apportioned and part paid to the widow; but there was no adverse argument or objection on behalf of the infant, and no doubt the Vice-Chancellor satisfied himself that the arrangement was one for

(1) L. R. 9 Eq. 179. (2) 34 Beav. 166.
(3) 25 Ir. L. R. 361.

SARGANT J. the benefit of the infant. I think, therefore, that that case is not an authority upon which I can act.

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Nor do I think that *Harrop* v. *Wilson* (1) really touches this case at all. It merely decided that where moneys for lands which had been taken compulsorily were in Court and the dividends had been paid to the widow in respect of her dower right and she had died between two dividend days, her representatives were entitled on her death to have an apportioned part of the dividend due on the second dividend day.

Then comes the case of *Gleeson* v. *Byrne* (2), where the learned judge followed *In re Hall's Estate.* (3) But there again there was no opposition. *Gleeson* v. *Byrne* (2) was a case of administration, and it was obviously convenient to the parties that, the widow consenting to have her interest valued and the value paid out of the purchase-money, that course should be adopted.

I think that the same criticism applies to the two forms of order which have been cited from Seton on Judgments, 7th ed. pp. 913 and 1485 respectively. It is obviously convenient, in a case where an estate is being administered for the benefit of creditors, and where real estate can only be sold subject to the incumbrances of such of the incumbrancers as consent to the sale, that, if a widow entitled to dower will be good enough to consent to take her interest in the shape of an immediate money payment, that course should be adopted and the proceeds of sale be liberated for the purposes of distribution. But it seems to me an entirely different thing when the persons entitled in remainder to the lands, and presumably or prima facie entitled in consequence to a remainder in the purchase-money, object and say that they would rather the widow should receive income corresponding to the rents which she would otherwise have received and that they should be entitled to the capital of the purchase-money in lieu of being entitled to the fee simple of the land. I think, speaking generally, that when purchase-money is substituted for land the rights of the parties in the purchase-money should correspond to their rights in the land, and that there should be no further alteration of those rights than such, if any, as is necessitated by the process of conversion and sale.

(1) 34 Beav. 166. (2) 25 Ir. L. R. 361.
(3) L. R. 9 Eq. 179.

Then it was said by Mr. Romer that, inasmuch as the administratrix had sold in the course of the administration and what was got rid of consisted of two rights or interests,—namely, her right as doweress and the rights in remainder subject to the dower—it must be deemed that the parties had come to an arrangement under which the lady was to get the capital sum out of the purchase-money. I cannot see any sufficient ground to justify me in coming to that conclusion. Even if a tenant for life who was a doweress, or any other tenant for life, and a remainderman themselves joined in the conveyance for a lump sum which was paid to the person entitled to receive it as a trustee (which is the case here, because the lady who sold was administratrix and in that capacity a trustee), it seems to me that the natural inference to draw is, not that they intended that the purchase-money should be divided up in proportion to the actuarial value of their respective interests, but that the purchase-money should be held upon trusts corresponding with the limitations of the real estate for which it was substituted.

In my opinion, therefore, the lady is not entitled to have a value set on her annuity; and I must say that in the present case there is an additional reason against that being done, because the right is one which terminates not only upon death, but also upon second marriage, so that there would be an additional difficulty in the valuation; but I do not rest my judgment upon that latter circumstance.

The plaintiff must pay the costs of the defendant W. G. Wilson, but there will be no other order as to costs.

Solicitors for plaintiff: *Morley, Shirreff & Co.*
Solicitors for defendant Clark: *Mason & Co.*
Solicitor for defendant Wilson: *A. J. Evans, for E. Lorimer Wilson, Manchester.*

F. E.

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GRESHAM LIFE ASSURANCE SOCIETY *v.* ATTORNEY-GENERAL.

[1914 G. 2172.]

Revenue—Income Tax—Life Assurance Society—Taxation on Profit or Income Basis—Annual Option of Taxing Authority—Agreement exercising Option for next Five Years—Validity—Declaratory Order—Joinder of Board of Inland Revenue—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Cases* 1, 3, 4, 5—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *ss.* 2, 5—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 57—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *s.* 1.

A life assurance society, having been assessed for income tax on an income basis for the financial year 1914-15, brought an action against the Attorney-General and the Board of Inland Revenue, alleging that by an agreement of 1912 the surveyor of taxes, acting on behalf of the Board, had agreed to assess them for the five years 1911-12 to 1915-16 (*a*) on a profit basis and (*b*) at an agreed figure of profit based on the previous quinquennial valuation, and asking for a declaration that the agreement was binding, and an injunction to restrain the Board from enforcing the recent assessment:—

Held, that if the agreement had borne the construction alleged by the society (which the Court did not accept) it would have been invalid, as the income tax was an annual tax imposed and assessed year by year, and neither the surveyor nor the Board could bind the Crown as to the basis or amount of assessment in future years.

Whether, having regard to the society's right of appeal to the General Commissioners under the Taxes Management Act, 1880, s. 57, it would have been right to make a declaratory order against the Attorney-General, *quaere*.

Whether, having regard to their functions under the Inland Revenue Regulation Act, 1890, s. 1, the Board were competent parties to an action of this nature, *quaere*.

WITNESS ACTION.

The plaintiff society, originally formed as a life assurance society under a deed of settlement of July 3, 1848, was registered as a limited company on July 28, 1893. The society's business being largely outside the United Kingdom, it was necessary for them to keep and maintain large investments in foreign countries in order to be at liberty to carry on their foreign business. These investments

were sometimes required to be in the national funds of the foreign countries.

In accordance with the society's laws and regulations a valuation was made at the end of every five years for the purpose of ascertaining the surplus of assets over liabilities.

For many years prior to 1911 the society had paid income tax by deduction on dividends and rents received in the United Kingdom, and had been assessed and had paid income tax upon income arising from untaxed interest received in the United Kingdom, including so much of their foreign investment income as was received in the United Kingdom. This was in accordance with the decision in *Gresham Life Assurance Society* v. *Bishop*. (1)

The quinquennial valuation for the period ending December 31, 1910, showed a surplus of assets over liabilities. This surplus was 372,705*l*. This result was communicated to the surveyor of taxes, who made certain inquiries thereon, evidently considering that in future the society ought to be assessed on their profits instead of on their investment income.

On November 1, 1911, the surveyor asked for a copy of the report of the 1910 valuation containing the consolidated revenue account for the quinquennium.

This report was duly forwarded on November 3, 1911, and on March 14, 1912, after some intermediate correspondence, the surveyor wrote to the society saying "Herewith I forward draft computation of the society's Schedule D liability for 1911-12, &c., and shall be obliged if you will say whether you are in agreement with it. If not will you kindly specify points of disagreement and give your reasons." This draft computation brought out the society's profit for the quinquennium at 228,565*l*. in excess of their taxed rents and dividends less British Annuities, or an annual profit of 45,713*l*., stated by the surveyor as the "annual liability for 1911-12 and four succeeding years."

On April 19, 1912, after some intermediate correspondence as to various items, the surveyor wrote to the society saying "Herewith I forward amended computation for your society's Schedule D liability for 1911-12 and succeeding years of the current quinquennium based on the results of the last quinquennium. I shall be

(1) [1902] A. C. 287.

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obliged if you will let me know whether you agree." This computation, headed "Amended computation of liability 1911-12," brought out the society's profit for the last quinquennium at 199,591*l.* in excess of their taxed rents and dividends less British Annuities, or 39,918*l.* per annum, which the surveyor called "Average for 1911-12 and four succeeding years." The taxed rents and dividends less British Annuities amounted to 233,609*l.* for the quinquennium, or about 46,000*l.* a year already taxed.

On April 24, 1912, the society replied, "Referring to your letter of the 19th instant with enclosure we beg to inform you that we are in accord with your computation for the society's Schedule D liability for 1911-12 and succeeding years of the current quinquennium."

The tax for 1911-12, 1912-13, and 1913-14 was assessed and paid on 39,918*l.* without any further return being made.

On July 31, 1914, the Finance Act, 1914 (4 & 5 Geo. 5, c. 10), was passed. Sect. 5 provided that income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom should, notwithstanding anything in the rules under the 4th and 5th cases in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income, "whether the income has been or will be received in the United Kingdom or not," subject to the deductions therein mentioned.

On October 14, 1914, the surveyor wrote to the society drawing their attention to the provisions of s. 5 of the Finance Act, 1914, as to income tax on foreign income and inquiring whether any such income had been received by or on behalf of the society during the three years ending April 5, 1914, and how it had been dealt with in the accounts.

On October 20, 1914, the society wrote to the Secretary of the Inland Revenue suggesting that the inquiry was made in error "seeing that this society's Schedule D liability was assessed in 1912 for the year ending April 5, 1912, and four succeeding years of the current quinquennium on the basis of the results of the previous quinquennium."

On October 31, 1914, the Secretary replied that he was instructed by the Board to point out that the surveyor's letter of April 19, 1912, stated the computation of the society's liability under

Sched. D, case 1, based on the results of the previous quinquennium, "and this computation would have been taken as the measure of the liability under case 1 for each of the five years 1911-12 to 1915-16 inclusive, had there been no change in the circumstances. There was no power at the time when the letter was written in April, 1912, to make an assessment for any year subsequent to the year 1911-12, and the assessments for the subsequent years fall to be made in accordance with the circumstances existing and the law in force for those years. In view of the change in the law made by section 5 of the Finance Act, 1914, it seems probable that the society's liability to income tax, Schedule D, will no longer be under case 1, and I am to ask that the information required by the surveyor may be furnished in order to enable the liability to be computed."

On November 20, 1914, the General Commissioners sent the society notice of an assessment in the sum of 400,000*l*. This assessment was based upon the society's total income including foreign investments and not upon their quinquennial profits.

On December 8, 1914, the society commenced this action against the Attorney-General (as representing the Crown) and the Board of Inland Revenue, alleging that the agreement constituted by the letters of April 19 and April 24, 1912, was made by the surveyor on behalf of the Board, or that they had ratified it, and charging that the said assessment was in breach of that agreement and was illegal and invalid. They claimed a declaration that the agreement was valid and binding and that they were entitled to be assessed in accordance therewith, and that no assessment contrary thereto should be made during the current quinquennium. They also claimed an injunction to restrain the Board from enforcing the recent assessment.

The defendants contended that the alleged agreement was wholly beyond the powers both of the surveyor and the Board, that the surveyor had no authority to enter into any such agreement, and that the letters did not in fact constitute such an agreement. They also contended that the society's proper remedy was an appeal to the General Commissioners, who were the proper statutory tribunal, and that there was therefore no case for a declaratory order against the Attorney-General. They also contended that the

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Board, not being the authority to enforce the assessment, and not having threatened to enforce it, were improperly joined as defendants.

Sir Robert Finlay, K.C., Upjohn, K.C., and *Bremner*, for the plaintiff society. The Income Tax Act, 1842, s. 100, Sched. D, contains five cases. These are applicable to Sched. D of the Income Tax Act, 1853, ss. 2, 5. The society being a trading company was taxable under case 1 (Trade Profits), case 3 (Uncertain Profits, e.g., untaxed English interest), case 4 (Income of Foreign Investments received here), and case 5 (Income of Foreign Possessions received here). As the same item could not be taxed under two heads, the Crown had an option either of taxing profits under case 1, when the whole income English and foreign would come into the profit and loss account subject to trade expenses, or of taxing actual income under cases 3, 4, and 5, when foreign income not received here would be excluded: *Gresham Life Assurance Society* v. *Bishop* (1); *Revell* v. *Edinburgh Life Insurance Co.* (2); *Liverpool and London and Globe Insurance Co.* v. *Bennett.* (3) This option was properly exercisable through the surveyor of taxes: *Smiles* v. *Northern Investment Co. of New Zealand.* (4) That is a very crucial point.

Before 1911 the society was taxed on income, foreign income not received here being excluded, but after the 1910 quinquennial valuation it was manifestly to the Crown's advantage to tax on profits, and the surveyor, with the help of the local superintending inspector, made a computation on the quinquennial valuation according to the practice authorized by *Northern Assurance Co.* v. *Russell* (5) in the case of life assurance companies, which from the nature of their accounts are unable to furnish a yearly return on a three years' average. The society agreed the figure 39,918*l.*, and the letters of April 19 and April 24, 1912, amounted to a definite agreement that the annual profit for the current quinquennium should be taken at that figure, and that during that quinquennium

(1) [1902] A. C. 287.
(2) (1906) 5 Tax Cas. 221, 226.
(3) [1912] 2 K. B. 41, 51, 56; [1913] A. C. 610, 616.
(4) (1886) 2 Tax Cas. 165, 177.
(5) (1889) 2 Tax Cas. 551, 571, 577.

the assessment should be made on a profit basis. It is submitted that the Board are bound by this agreement.

The Board of Inland Revenue are now appointed under the Inland Revenue Regulation Act, 1890, s. 1, for "the collection and management of inland revenue" and with "all necessary powers for carrying into execution every Act of Parliament relating to inland revenue." They do not make assessments themselves. These are made by the additional Commissioners and confirmed by the General Commissioners (Income Tax Act, 1842, ss. 4, 16, 111—117). The surveyor, who is appointed by the Treasury or the Board (Taxes Management Act, 1880, s. 5), lays the proposed assessment before the additional Commissioners, who make a provisional assessment, which only becomes binding when confirmed by the General Commissioners. For form of certificate see Taxes Management Act, 1880, Sched. II., Form 2. Now the Taxes Management Act, 1880, s. 13, provides that "The collectors of inland revenue, surveyors, and all other officers or persons who shall be employed in the execution of this Act, or the Tax Acts, shall observe and follow the orders, instructions, and directions of the Board." The agreement was therefore made by the surveyor in the course of his duties as servant of the Board and bound the Board ab initio.

If, however, the surveyor in fact exceeded his authority, the subsequent assessment at the same figure in the two subsequent years amounted to ratification.

It is suggested that the Board could neither make nor ratify such an agreement. But the fact that they or their officers may accept the quinquennial valuation instead of the statutory yearly return surely shows that as a practical business arrangement they may enter into a binding agreement for each quinquennium both as to the basis and amount of taxation. In other words, they may exercise their option at the beginning of each quinquennium for the whole quinquennium. This is what they have done by the present agreement, which is quite clear and unambiguous, and the present assessment is a direct breach.

This is a proper case for a declaratory order against the Attorney-General: *Dyson* v. *Attorney-General* (1); *Burghes* v. *Attorney-*

(1) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

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General (1); *Hodge* v. *Attorney-General* (2); and, having regard to their powers under the Inland Revenue Regulation Act, 1890, s. 1, the Board are proper parties. No additional expense has been incurred by their joinder.

Sir George Cave, S.-G., and *Sheldon*, for the defendants. The alleged agreement was not within the competence of the Board. The income tax is an annual tax imposed and assessed for one year only: Income Tax Act, 1842, s. 176; Taxes Management Act, 1880, s. 48; *Bowles* v. *Attorney-General* (3); *Bowles* v. *Bank of England.* (4) In the case of trading societies like the present the Crown has an option to tax on profits or income: *Liverpool and London and Globe Insurance Co.* v. *Bennett* (5); *Clerical, Medical and General Life Assurance Society* v. *Carter.* (6) But it cannot exercise that option until it knows the rate and scope of the tax and the particular circumstances in each year. The present case is a good illustration. The income has not increased, but the taxable income has largely increased. How could the Crown bind itself in advance not to tax it? The alleged agreement, therefore, even if made by the Board, was wholly ultra vires.

Secondly, the surveyor had clearly no authority to enter into any such agreement. His duties are strictly defined by the Taxes Management Act, 1880, ss. 51—56. No doubt he has to obey the directions of the Board under s. 13, but that does not make him their agent outside the scope of his statutory duties. The fact that the two subsequent assessments were made at the same figure is no confirmation of the alleged agreement.

Thirdly, the letters did not amount to any such agreement as alleged. They amounted at most to an agreement to take 39,918*l.* as the profit figure for the current quinquennium, if the profit basis of taxation were maintained. That agreement is not strictly binding, but no doubt in practice the same figure would have been accepted on a subsequent profit taxation.

Fourthly, this is not a proper case for a declaratory order against

(1) [1911] 2 Ch. 139; [1912] 1 Ch. 173.
(2) (1839) 3 Y. & C. Ex. 342.
(3) [1912] 1 Ch. 123, 132.
(4) [1913] 1 Ch. 57, 87.
(5) [1912] 2 K. B. 41, 51, 56; [1913] A. C. 610, 616.
(6) (1889) 22 Q. B. D. 444; 2 Tax Cas. 437.

the Attorney-General. There is a special tribunal for the decision of these questions. The society could appeal to the General Commissioners under the Taxes Management Act, 1880, s. 57, on the ground that the assessment was on a wrong basis, and the General Commissioners could state a special case under s. 59. In these circumstances a declaratory order ought not to be made: *Grand Junction Waterworks Co.* v. *Hampton Urban Council.* (1) In *Dyson* v. *Attorney-General* (2) and *Burghes* v. *Attorney-General* (3) there was no such special tribunal, and in the latter case Warrington J. pointed this out. (4)

Fifthly, the Board ought not to be made parties. They have general powers of management, but they are not the persons to enforce the assessment. The machinery for collection, distress, and committal for non-payment is in the hands of the General Commissioners: Taxes Management Act, 1880, ss. 73—89. The Board's only direct remedy is a suit by the Attorney-General for a Crown debt under s. 111, and there has been no suggestion of any such proceeding.

Bremner in reply. The General Commissioners would only consider whether the assessment was right under the general law. They would not go into the question of the construction or validity of the special agreement. There is therefore no special tribunal available in this case.

Again, the Board are proper parties, as they have "all necessary powers for carrying into execution every Act of Parliament relating to inland revenue": Inland Revenue Regulation Act, 1890, s. 1.

The hardship of taxing the foreign life assurance fund income has now been recognized by the Legislature in the Finance Act, 1915 (5 & 6 Geo. 5, c. 62), s. 16, which provides that s. 5 of the Finance Act, 1914, shall not apply to income arising from the investments of the foreign life assurance fund. The Act was, however, only passed on July 29, 1915, and does not apply to the present assessment.

ASTBURY J., after stating the facts up to the surveyor's letter forwarding the "draft computation of the society's Schedule D

(1) [1898] 2 Ch. 331.
(2) [1911] 1 K. B. 410; [1912] 1 Ch. 158.
(3) [1911] 2 Ch. 139; [1912] 1 Ch. 173.
(4) [1911] 2 Ch. 157.

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liability for 1911-12, &c.," and the computation therein of their "annual liability for 1911-12 and four succeeding years" at 45,713*l.*, continued: It is perfectly plain that both in that expression and in the letter the surveyor used an inaccurate term. The computed annual profit of the past quinquennium was not of course the society's annual liability at all, but it was set out as the proposed figure of annual profit arrived at by dividing the profit result of the past quinquennium by 5. The fact that the society had been in the habit of making quinquennial valuations sufficiently accounts for the expression. At all events the letter asked the society to specify points of disagreement and give their reasons, and I do not understand what points of disagreement or reasons they could specify or give except with reference to the figures in the draft computation.

On April 19, 1912, after further discussion, the surveyor wrote: "Herewith I forward amended computation for your society's Schedule D liability for 1911-12 and succeeding years of the current quinquennium based on the results of the last quinquennium. I shall be obliged if you will let me know whether you agree." The enclosed document headed "Amended computation of liability 1911-12" arrived at an annual profit of 39,918*l.* during the last quinquennium. That was stated to be "Average for 1911-12 and four succeeding years." That again was inaccurate. The figure arrived at was the average for the past quinquennium, and the question is what was the meaning of the letter and enclosure having regard to the society's answer.

On April 24, 1912, the society replied: "Referring to your letter of the 19th instant we beg to inform you that we are in accord with your computation for the society's Schedule D liability for 1911-12 and succeeding years of the current quinquennium."

The question is whether those letters of April 19 and April 24, 1912, constituted a valid and binding agreement between the society and the Crown that not only should the agreed figure of 39,918*l.* arrived at from the last quinquennium be accepted as the estimated annual profit of the society until the next quinquennial valuation, but also that the Crown would not in the succeeding four years, whatever the change in the law or circumstances, assess the society upon an income basis in lieu of a profit basis.

The figure 39,918*l.* being agreed, the society paid their income tax on this profit basis for 1911-12, and in the two succeeding years they were assessed at the same figure without any further return. [His Lordship then referred to the Finance Act, 1914, s. 5, and the subsequent correspondence with reference to the proposal to revert to taxation on an income basis, and pointed out that the society's contention that their liability was assessed in 1912 for the year ending April 5, 1912, and four succeeding years of the current quinquennium was obviously inaccurate, as they were not in any sense assessed in 1912 for any year subsequent to the year of that assessment. His Lordship continued :] In the result this action is brought against the Attorney-General and the Board of Inland Revenue. The defendants have raised certain questions as to their competence to be sued, but I will first deal with the merits of the case.

It is admittedly clear on the authorities that in assessing a society of this kind the taxing authority has an option to tax it under case 1 or cases 4 and 5 of Sched. D, or both, provided that the society is not taxed twice over in respect of the same income or moneys. This appears from a number of authorities.

In *Liverpool and London and Globe Insurance Co.* v. *Bennett* (1) Cozens-Hardy M.R. quotes with approval the judgment in *Revell* v. *Edinburgh Life Insurance Co.* (2), where Lord Dunedin said : " The Income Tax Acts are complicated enough, but I thought it had been settled beyond all possibility of doubt that inasmuch as the Income Tax Acts do not only deal with profit in the true sense of the word as a commercial profit, but also deal with and impose taxes upon the interest of investments, the Crown has always been allowed when investments are held by a trading company, if it suits them, to say, ' We will charge you a tax upon the produce of your investments, and we won't charge the tax upon your profits.' " Fletcher Moulton L.J. said (3) : " In my opinion the true position of the five cases under Sched. D is as follows : They impose separate and independent liabilities to pay income tax, and so far as the circumstances of any individual bring him within the ambit of any one of them he is liable to pay the income tax imposed thereby.

(1) [1912] 2 K. B. 41, 51. (2) 5 Tax Cas. 221, 226.
(3) [1912] 2 K. B. 56.

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But they are not cumulative. This has been held by every Court and is evident from the nature and structure of the Act itself. The Crown may therefore enforce any one or more of these liabilities, but if it enforces more than one it must do so only to such an extent that there is no double charging in respect of any item of income or receipt." This decision was affirmed by the House of Lords. (1)

Under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 5, there is a liability imposed upon a society like this to make a valuation once in every five years, or at such shorter intervals as may be prescribed by their regulations. In the event of the authorities deciding to tax a life assurance society upon their profits a difficulty arises in practice in ascertaining those annual profits. It is plain from a business point of view that a life assurance society has no ascertainable annual profit. The profit, such as it is, has to be ascertained by actuarial calculations and is at the best an estimate.

Under Sched. D, case 1, " Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade," the rules provide that " the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment." I am told, and there is no contest upon this point, that in taxing life assurance societies upon profits it has for some years been the practice of the authorities to accept, subject to any necessary alteration or agreement, the quinquennial valuation instead of strictly insisting upon a three years' average under the statute.

In *Northern Assurance Co.* v. *Russell* (2) the learned Lord President gave a series of directions to the Commissioners of Income Tax in Scotland as to the various rules that they should observe in these and similar cases. After dealing with fire insurance business the profits of which can be ascertained year by year, he said : " This rule is not applicable to the ascertainment of profits and gains upon the life business." After describing the nature of that business

(1) [1913] A. C. 610. (2) 2 Tax Cas. 551, 571, 577,

and dealing with the difficulties which necessarily arise, he said: "The profits and gains can be ascertained only by actuarial calculations, and this actuarial calculation may be obtained by taking the result of the quinquennial investigation prescribed by statute or the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by Schedule D of the Income Tax Acts."

This being the state of the law and practice, the letters in question in this action were written, and three questions have been argued before me in respect of them: First, whether any such agreement as alleged could be lawfully entered into on behalf of the Crown; secondly, whether the surveyor of taxes had any authority to conclude any such agreement; and, thirdly, whether the surveyor purported in these letters to make any such agreement.

Before dealing with these three points I will deal with the society's contention that this agreement has not only been made, but acted upon for three years. I do not see any evidence of that. What took place was that in and for the year 1911-12 the agreement in question was undoubtedly made. The letter contains the reference to the succeeding years, which I will deal with presently. In the two financial years 1912-13 and 1913-14 the taxing authority in fact assessed the society on the agreed figure of their profits as shown by the past quinquennium; but there is nothing proved before me to show that the authorities in so assessing the society for those two financial years were acting or purporting to act upon any agreement which they considered binding upon themselves to prevent them reverting, should they think fit, to an assessment upon an income basis.

With regard to the first point above mentioned, whether this agreement, if it was made, is valid, it is to be observed that the income tax is in this country a yearly tax only.

In *Bowles* v. *Attorney-General* (1) Parker J. said: "It appears certain that the income tax was originally imposed as, and was intended to be, a temporary tax only, and the Acts regulating its collection have always been so drawn as to expire automatically (except as to arrears) at the end of the period of such imposition. If reimposed at the end of this period, the Acts were revived and

(1) [1912] 1 Ch. 123, 132.

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continued by the Act reimposing the tax, but again only for the period of reimposition. The tax is still, as a matter of form, imposed as a temporary tax only, the period of imposition being for one year; but the hopes once entertained that it would be in fact temporary have long since vanished." In *Bowles* v. *Bank of England* (1) the same learned judge said: "As I have already pointed out, no assessment is possible unless the rate of tax is ascertained."

The defendants contend, and I think rightly, that the taxing authorities in 1912 had no power to make any contract with this society either as to the assessment which should be made in any subsequent year or as to the basis upon which the assessment should be made. The authorities, as each yearly Act is passed, have an option to tax the society either on a profit or an income basis. I conceive it to be their duty as each year comes round to ascertain the rate of the tax of the year and the circumstances existing, and then tax the subject in the way most favourable to the Crown. In this particular case I do not think the letters bear the meaning the society put on them, but assuming they do, and that the surveyor intended to bind the taxing authorities for the succeeding four years to an agreement that whatever might be the changes in the law and the circumstances of this society they would continue to tax them on a profit basis, however undesirable that basis might become, that agreement would in my judgment be invalid and one which the surveyor, and indeed the taxing authorities, would have no power or right to enter into.

The second question is whether the surveyor, as such, had any authority to conclude this agreement. I do not think it really is contended by the society that as surveyor he had any such authority, but they say that the surveyor as the servant of the Board made this agreement on the Board's behalf, and that the Board by acting upon it for three years have sufficiently confirmed it. For the reasons I have already given I do not think that confirmation is made out, and with regard to the surveyor's own authority, he appears under the statutes to have certain defined duties only, and I think he has no power to act outside the sphere of those duties, whether as servant of the Board or otherwise. I cannot find in the

(1) [1913] 1 Ch. 57, 87.

statutes any power either in the surveyor or in the Board to tie their hands in one year with respect to the duties under the statutes which may be passed, and no doubt will be passed, in subsequent years.

The question, however, really turns in the first instance upon the third point, namely, whether any such agreement was in fact entered into. It is quite clear that both parties in taking part in this arrangement had in mind the practice of making use of the quinquennial valuation in the profit taxation of life assurance companies. I think the real meaning of these letters is that an agreement was arrived at as to the true figure of annual profits which was shown by the past quinquennium, and which as a figure would not be disturbed until there was a new quinquennial valuation, if and so long as the society was taxed upon a profit basis which made that figure a relevant one. In other words, I do not think that these letters really meant that a profit assessment and not an income assessment should be made until the next quinquennium, that is for the year 1911-12 and the four succeeding years, irrespective of changes of law and circumstances. On the true construction of this agreement I hold that it did not tie the hands of the taxing authorities as to whether in future years they would or would not exercise their option to tax this society on an income basis if it became their interest or duty to do so. For that reason the action, in my judgment, fails.

The defendants have also contended that in any event this is a case which ought not to have been brought against the Attorney-General under the law and practice as laid down in *Dyson* v. *Attorney-General* (1), there being, as they contend, a special tribunal appointed by the Income Tax Acts for dealing with questions arising thereunder. The society, on the other hand, contend that the only point that this tribunal can take into account is whether the assessment before it contravenes the provisions of the statute for the time being in force, and that it could not deal with the question of the construction or validity of the agreement alleged here. I do not propose to determine this point.

The defendants also contend that the Board are not competent parties to an action of this kind. It is said that they can neither

(1) [1911] 1 K. B. 410.

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enforce nor act nor proceed upon the assessment, and that their presence in this action is wholly unnecessary. That again, notwithstanding the provisions of s. 1 of the Inland Revenue Regulation Act, 1890, I do not propose to decide.

The result will be judgment in favour of the Crown.

Sir George Cave, S.-G. This is one of those cases in which the Crown neither pays nor receives costs. That was so in *Dyson* v. *Attorney-General.* (1)

ASTBURY J. Very well.

Solicitors : *Devonshire, Monkland & Co.; Solicitor of Inland Revenue.*

G. R. A.

C. A. 1916 *Jan.* 13.

In re STOODLEY.
HOOSON *v.* LOCOCK.

[1915 S. 1590.]

Will—Codicil—Construction—Revocation—Residuary Disposition in Will Bequest in Codicil of "the residue of my estate not bequeathed by the above will."

A testator, by his will dated December 21, 1912, after making numerous specific and pecuniary bequests and devising certain lands for charitable purposes, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust to sell, and, after making certain payments therein directed, to hold the residue and the income thereof in trust, as to one third, for the Society for Promoting Christian Knowledge, and as to the other two thirds for the vicar of I. for purposes connected with his church. By a codicil dated February 17, 1915, after referring to his will, he gave and bequeathed "the residue of my estate not bequeathed by the above will" to M. A. L. absolutely, and appointed her sole executrix of the codicil. He died on February 27, 1915 :—

Held, reversing the decision of Eve J. [1915] 2 Ch. 295, and following *Earl of Hardwicke* v. *Douglas* (1840) 7 Cl. & F. 795, that

(1) [1911] 1 K. B. 410 ; [1912] 1 Ch. 158.

the residuary gift in the will was revoked by the codicil, and that under the gift in the codicil the whole of the testator's estate undisposed of by legacies or specific bequests passed to M. A. L.

APPEAL from a decision of Eve J. (1)

By his will, dated December 21, 1912, the testator, Thomasin Albert Stoodley, clerk in holy orders, appointed the plaintiffs, the Rev. Percy Lane Hooson and John Heslington Pitchforth, to be his executors and trustees, and, after making various specific and pecuniary bequests, gave and devised certain lands, or the money to arise from the sale thereof, for a charitable purpose. He then made another gift for the spiritual benefit of the parish of Ilminster in Somersetshire, and continued: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust that they shall sell, call in, and collect the same, and shall, out of the monies to arise thereby, and all other monies forming part of my estate, pay my funeral and testamentary expenses and debts, and the legacies other than specific bequeathed by this my will, or any codicil thereto, and shall hold the residue of the said monies and the income thereof in trust, as to one equal third part thereof, for the Society for Promoting Christian Knowledge, and as to the two remaining equal third parts, for the vicar for the time being of Ilminster aforesaid, to be applied by him as to part thereof towards providing an adequate vestry for the parish church, and as to the remainder towards extending the nave of the said church one bay westwards."

He made a codicil to his will dated February 17, 1915, but signed on February 19, 1915, in the following terms: "This is a codicil to the will of me, Thomasin Albert Stoodley, of 73, Wimborne Road, Bournemouth, the said will having been made in December, 1912, and being in the possession of J. H. Pitchforth, solicitor, of 9, Bush Lane, Cannon Street, E.C. The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of 39, Carlton Road, Putney, S.W., absolutely, and I appoint her sole executrix of this codicil."

The testator died on February 27, 1915, and probate of the will and codicil was granted to the plaintiffs and to M. A. Locock on

(1) [1915] 2 Ch. 295.

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May 4, 1915. The residuary estate amounted to 3819*l.* 18*s.* 5*d.* One of the specific gifts contained in the will had lapsed. The testator was a widower at the time of his death, and died without issue and without leaving parent, brother or sister, nephew or niece, him surviving.

A summons was taken out by the executors and trustees of the will against M. A. Locock, the Society for Promoting Christian Knowledge, and the vicar of Ilminster for the determination of the question whether the gift by the codicil to M. A. Locock revoked, in whole or in part, the residuary gift in the will, or, alternatively, what portion of the testator's estate passed to M. A. Locock under the gift in the codicil.

Eve J. held that the residuary gift under the will was not revoked by the codicil, and that what passed under the bequest in the codicil was such portion (if any) of the residue as might ultimately turn out not to have been effectually disposed of by the will.

M. A. Locock appealed.

Upjohn, K.C., *Maugham, K.C.*, and *H. B. Vaisey*, for the appellant. The gift in the codicil is a new disposition of the residue and by implication revokes the residuary gift contained in the will. The testator must have intended the codicil to have some operation. If the gift of residue under the will is not revoked the codicil can have nothing to operate upon. The gift in the codicil is of everything which was not " bequeathed " by the will. That word does not apply to the disposition by way of trust of the residue. The case is really covered by the decision of the House of Lords in *Earl of Hardwicke* v. *Douglas* (1), where there was a complete disposition of residue by the will and a different disposition of the same by the codicil, and it was held that the disposition of residue under the will was revoked by the codicil. [They also referred to *Randfield* v. *Randfield* (2) and *Hearle* v. *Hicks*. (3)]

Clayton, K.C., and *A. J. Spencer* (for *F. H. L. Errington*, serving with His Majesty's Forces), for the Society for Promoting Christian Knowledge. The decision of Eve J. is right and for the reasons given in his judgment. The decision in *Earl of Hardwicke* v.

(1) 7 Cl. & F. 795. (2) (1860) 8 H. L. C. 225.
(3) (1832) 1 Cl. & F. 20.

Douglas (1) was arrived at after considerable doubt, and Lord Cottenham, who as Master of the Rolls originally gave the decision appealed from, dissented from the opinion of the majority of the House. That case is really no authority upon the will which is under consideration. On failure for any reason of any part of the two gifts to the charities there would be something for the residuary gift in the codicil to operate upon: *In re Isaac* (2); *Kermode* v. *Macdonald.* (3)

E. P. Hewitt, K.C., and *F. E. Farrer*, for the vicar of Ilminster. In *Earl of Hardwicke* v. *Douglas* (1) Lord Brougham relied upon the fact that the testator had the will before him when he made the codicil, and knew that he had disposed of everything and that the codicil would have nothing to operate upon unless it revoked the residuary gift under the will. In this case there might be a disclaimer of the gift to the vicar of Ilminster: *Lee* v. *Delane* (4), where *Earl of Hardwicke* v. *Douglas* (1) was distinguished. At any rate the gifts to the charities might fail in whole or in part: *Turton* v. *Reignolds.* (5) There is no clear revocation here: *Hearle* v. *Hicks.* (6)

F. Whinney, for the executors and trustees of the will.

LORD COZENS-HARDY M.R. This is an appeal from the decision of Eve J. upon the construction of a codicil. [The Master of the Rolls then read the will and codicil and continued:] The point which has to be determined on this appeal is whether the effect of the codicil is to deprive the charities of their interests in the residuary estate, or whether Miss Locock fails to take anything under the codicil.

Apart from authority, this is a case which I think would have given me considerable doubt; but in a case of this kind, when the point has been many years ago elaborately argued—in fact twice argued—in the House of Lords, and when a decision has been given laying down, as I think, a certain principle, we ought to follow it. The principle which I think is laid down in the case to which I shall refer is this: that if you find a residue given by will, and then

(1) 7 Cl. & F. 795.
(2) [1905] 1 Ch. 427.
(3) (1868) L. R. 3 Ch. 584.
(4) (1850) 4 De G. & Sm. 1.
(5) (1701) 12 Mod. 433.
(6) 1 Cl. & F. 20.

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there is a codicil, called a codicil, giving that residue to a different person or in a different mode, it is really a revocation of the gift of the residue by the will. That this was a testamentary instrument and that the testator had a testamentary intention is quite clear. He appoints this lady sole executrix of this codicil, and she and the two executors named in the will jointly proved the will and codicil.

Two views on this question were taken in the case of *Earl of Hardwicke* v. *Douglas*. (1) Lord Cottenham, when he was Master of the Rolls, held in that case that the legatee under the codicil took nothing; that the codicil had no effect; but when it came before the House of Lords the noble Lords present were Lord Cottenham himself, by whom the original decision was given, and Lord Brougham and Lord Lyndhurst. Lord Brougham and Lord Lyndhurst reversed the decision of Lord Cottenham on the ground that the second codicil was a revocation of the gift of the residue, and that the persons entitled to the residue were the original legatee and another person taking in moieties according to the terms of the codicil. It has been suggested that the decision is not based upon any question of principle, but upon the ground that the testator there had, and it was admitted that he had, the will before him at the date when the codicil was made. I think it is impossible for us to vary the construction of the codicil on the ground that in one case the will that is referred to in the codicil was physically before the testator and in the other case it was not, although he knew there was a will which contained those bequests and devises. Then, again, it is said there was a clearer indication in that case that the terms of the gift of the residue in the will were present to his mind. I decline to assume that this testator, when he made his codicil, had no idea what the residuary gift in his will was. It is rather an elaborate one—one third to the Society for Promoting Christian Knowledge and the other two thirds to the vicar for the time being of Ilminster. I do not think we ought to treat the case of *Earl of Hardwicke* v. *Douglas* (1) otherwise than as a guide to direct us in this case. How has it been dealt with? Has it ever been questioned or interfered with or doubted by text-writers or by persons of authority? In dealing with a decision of the House of Lords at that time one looks, and one is bound to look,

(1) 7 Cl & F. 795.

to what has been said by Lord St. Leonards in Sugden's Law of Property. He discusses this case at pp. 217 and 218 and says: "But where an intention can be collected to make a new disposition by a codicil giving a residue, it will operate against a disposition of the residue by the will, although there is no express revocation, and the gift in the codicil is of the residue not thereinbefore or by the will disposed of. This was decided in the case of *Lord Hardwicke* v. *Douglas*." (1) He then goes through all the facts of that case and refers to Lord Cottenham's decision as Master of the Rolls; he also refers to the difference of opinion in the House of Lords and says that the decision of Lord Brougham and Lord Lyndhurst was the best construction and was one that manifestly carried out the intention of the testator. Has it ever been doubted by text-writers? I look at Jarman on Wills, 6th ed. at p. 173, where he says this: "so if the residue of personal estate be given by will to A., and by codicil to B., the former gift is revoked. And this was so held in *Earl of Hardwicke* v. *Douglas* (1), though the gift by codicil was of personal estate 'not hereinbefore or by my will or any other codicil disposed of.' The words were construed to mean 'not hereinbefore or by my will disposed of by way of particular legacies,' thus leaving something for the gift to operate upon: literally construed they left nothing." I therefore think that unless we can find some special circumstances, which I cannot find in this case, we must take the view that Eve J.'s decision cannot be upheld.

The point which I have felt some doubt about is this: There was a time, not many years ago, when a gift of residue like this to a charity was extremely likely to fail as far as impure personal estate was concerned, and if that were the present state of the law, then it might have been held that the original gift in the will remained and that the codicil operated only upon the residue so far as it consisted of impure personal estate. But that is not the law now, and, therefore, that difficulty no longer exists. I do not think that we can construe this will on the assumption that the testator, who was a clergyman, was thinking of the old law. He was, of course, thinking of nothing of the kind, and we must construe his language as we find it.

Then it was said that this will might fail so far as the residue

(1) 7 Cl. & F. 795.

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was concerned, because, even assuming that the Society for Promoting Christian Knowledge could take, the vicar of Ilminster might disclaim. No authority has been cited for that, and it does not require any discussion. It is elementary law that a gift to a charity never fails for the want of a trustee, because the Court would see that a proper trustee was appointed and would take care, if necessary, that it should be done under the direction of the Attorney-General.

Then, further, it is said, with regard to the gift to the vicar of Ilminster for the purpose of enlarging the nave of the church, there might be a difficulty in obtaining a faculty. I am not going to suppose such a thing, and it is not necessary to discuss or consider it. I think the gift to Mabel Abbie Locock must prevail and that it revokes the gift of the residue to the charities under the will. We must therefore reverse the decision of Eve J. and make a declaration accordingly.

WARRINGTON L.J. (after referring to the terms of the codicil). Reading that codicil by itself, I have not the remotest doubt that what the testator meant to bequeath to Miss Locock was the residue of his estate in the ordinary sense. The difficulty arises when, looking at the will, you find that there is apparently no residue not bequeathed by the will, and therefore there is nothing for the codicil to operate upon. Looking at the will I find that the testator appointed certain persons as executors, and then, using the words "I bequeath," gave several specific and pecuniary legacies, and, using the words "I give and devise," he made certain specific devises of real estate. He then inserted a general devise and bequest of his real and personal estate in these terms: [The Lord Justice read the bequest and continued :]

The contention on the part of the two charities which would benefit by the will is that, in the events that have happened, the codicil is ineffective, because the whole of the testator's property is bequeathed by the testator's will, and therefore there is nothing left on which the codicil can operate. The result of that would be to impute to the testator that he sat down and wrote this codicil giving the residue of his estate to Miss Locock knowing at the same time that it could have no effect. It seems to me absurd to suppose

that the testator was thinking when he made this codicil that possibly there might be some difficulty in applying some of the money included in the residue to the improvement in the fabric of the church, or still less to impute to him forgetfulness of the fact that he had made a will which, by the way, he refers to specifically by date in the codicil, or that he could have forgotten that he had made the will and that it contained a gift of residue. I cannot impute such a thing to the testator. Then you have to see whether, without imputing such an absurd intention to the testator, you can give a reasonable construction to the codicil which will give effect to it, and I think you can. There is no difficulty at all in referring the word "bequeathed" contained in the codicil to gifts other than those of the residue itself with which the codicil is dealing. The codicil deals with the residue so far as not bequeathed by the will. It is absurd to suppose that, having bequeathed the residue by the will, he intended that the words "not hereinbefore bequeathed" should extend to the residue itself. You may quite well so construe the codicil as to give the word "bequeathed" a meaning that would exclude the gift of the residue. I think, therefore, independently of authority, I should have come to the conclusion, on the true construction of the codicil, that it did take effect upon the general residuary estate of the testator; but when one comes to look at the authority which has been cited to us of *Earl of Hardwicke* v. *Douglas* (1) any possible difficulty one might have had on the construction of the words themselves is entirely removed. That was, in my view, an extremely strong case. The testator there, having made by his will an effectual gift of residue, by his codicil used these words: "All the rest and residue of my property, not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath," in a manner other than that in which he had given the residue by the will. That is a case, therefore, in which it would have been difficult to have given to the codicil such a construction as I have suggested can be given to it in this case, because he used the words there "disposed of" and not "bequeathed." I think, therefore, having regard both to the words themselves and to the authority of *Earl of Hardwicke* v. *Douglas* (1), the judgment of the learned judge was wrong and ought to be reversed.

(1) 7 Cl. & F. 795.

C. A. 1916 STOODLEY *In re.* HOOSON *v.* LOCOCK.

BRAY J. I agree. I do not think this case can really be distinguished from *Earl of Hardwicke* v. *Douglas*. (1) The opposing views in that case were these : first, the manifest intention of the testator, and, on the other side, were the words which, perhaps, literally construed, would not have given effect to the intention, and what the learned judges had to decide was which view should prevail. I think that appears quite plainly from the speech of Lord Brougham in the House of Lords (2), where, after referring to the nature of the case and the particular words used, he says—and his speech had been settled between him and Lord Lyndhurst—" The one construction makes the testator give ' all the residue of his property over the particular legacies given in the will and codicils '; which is a sensible construction, and leaves something for the words to act upon. The other construction makes him give all the residue over the legacies and over all the residue ; that is, all that remains after the legacies and after what remains over these legacies ; which is not a sensible construction, and leaves nothing whatever." On the other hand, the Lord Chancellor differed and said this (3) : " as the opinion which I have formed differs from that at which they have arrived in their superior judgment, I think it right, as it involves a question of principles, to state to your Lordships the grounds on which I originally formed an opinion in favour of the respondent." Then, after stating that he could not doubt, really, what the real intention was, he says : " The difficulty is, how far we are justified in coming to a conclusion which shall give effect to that probable intention : and I must say I find no words in this codicil which can lead to such a conclusion. It is more from the situation of the parties and the probability of the case that I infer that that probably was the intention of the testator, than from anything I find in the testamentary papers : but if the words do not bear it, it is contrary to all rule to speculate upon the intention ; for the ground of conclusion ought not to be found in anything but the expressions which are used." If that opinion had been adopted, our decision in this case must have been in favour of the charities ; but the learned Lords differed from him on what seems to me to be a question of principle. Looking at it in the same way in this case,

(1) 7 Cl & F. 795. (2) 7 Cl. & F. 811.
(3) 7 Cl. & F. 813, 814.

one cannot doubt that it was the intention of the testator by this codicil to give a substantial benefit to this lady. The words are: "The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of 39, Carlton Road, Putney, S.W., absolutely, and I appoint her sole executrix of this codicil." That is the whole of the codicil. The codicil was not brought into existence for any other purpose except to make this lady a substantial gift, and to say that we are to construe it as if the intention of the testator was to give her nothing, or the barest possibility of something, certainly does not commend itself to me, and is not an intention which I can infer. On those grounds I think the appeal should succeed.

Solicitors: *J. H. Pitchforth; Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall & Co., Bristol; Bridges, Sawtell & Co.; Wansey, Stammers & Co., for E. Lee Michell, Wellington, Somerset.*

G. A. S.

DREXEL *v.* DREXEL.

[1915 D. 960.]

Practice—Writ—Service out of the Jurisdiction—Separation Deed—Covenant to pay a Separate Allowance—Domicil—"Ordinarily resident" within the Jurisdiction—Contract which "ought to be performed" within the Jurisdiction—Rules of the Supreme Court, Order XI., r. 1 (c) and (e).

D. and his wife, Americans by origin, in 1897 came with their family to England, made it their permanent home, and acquired an English domicil. D. was connected with a banking business in America and in Paris. In January, 1913, they entered into a deed of separation, prepared in America by American lawyers and executed by D. in America and by his wife in England, by which they agreed to live apart, and D. covenanted (amongst other things) to pay his wife an allowance of 50,000 dollars per annum, but no place for payment was stated. They continued to reside in England, each having a separate establishment, but in June, 1915, D. closed his establishment in England and went to Paris intending to acquire a French domicil and to institute divorce proceedings in the French Courts so as to get rid of the separation deed. In July, 1915, the wife issued a writ against D. to enforce the provisions of the separation

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deed, and obtained leave under Order XI., r. 1 (*c*), to serve the writ on him in Paris on the ground that he was ordinarily resident in England. He entered a conditional appearance and moved to discharge the service of the writ upon him, alleging (1.) that he was not domiciled or ordinarily resident in England at the date of the issue of the writ, and (2.) that there had been no breach by him of any contract in the separation deed that came within r. 1 (*e*) of the Order :—

Held, on the evidence, that D. was not domiciled or ordinarily resident in England at the date of the issue of the writ.

But *held*, that his covenant to pay the allowance was a contract which came within r. 1 (*e*) for the breach of which the wife was entitled to sue in England, and therefore that his application failed.

MOTION.

The plaintiff and her husband, the defendant, were Americans by origin. They married in America in 1886, and their four children were born there. In 1897 they came with their family to England with the intention of residing in England and making it their permanent home. Their children were educated in England, and they lived continuously in England until differences arose between them in 1911, when they separated but continued to live in England. The defendant was connected with a banking business at Philadelphia in the United States and in Paris, and paid short visits to America about once a year. From about 1906 he also had apartments in Paris. On January 20, 1913, the plaintiff and defendant entered into a deed of separation which was prepared by American lawyers and was executed by the defendant at Philadelphia, where he happened to be at the time. The plaintiff executed it in England, where she was living, and sent it to her agent at Philadelphia for delivery. By this deed, after reciting that circumstances had arisen which in the wife's judgment made it absolutely necessary that she should live separate from her husband, it was witnessed that the parties thereto, "in consideration of the premises and the desire of the husband to prevent the institution of divorce proceedings by wife and the desire of both to save dissensions resulting from living together," thereby covenanted with each other (inter alia) as follows :

"1. Wife abandons her intentions to institute proceedings in divorce and agrees that she will institute no such proceedings for any cause now existing.

"2. Husband and wife agree that they will live separate and apart, neither in any way interfering with harassing or annoying the other by visits correspondence or in any way otherwise.

"3. Wife will not in any way interfere with husband in his life. He is to be at liberty to live wherever he pleases, without the presence of, and separated from his wife.

"4. Husband will not in any way interfere with wife in her life. She is to be at liberty to live wherever she pleases, without the presence of, and separated from husband.

"5. Husband will bring no action of any sort or kind against wife, and wife will bring no action of any sort or kind against husband. Neither shall have any right to interfere with the life or friends of the other.

"6. Husband agrees to pay wife, during his lifetime, the sum of fifty thousand dollars per annum, in equal monthly instalments, the first monthly payment to be made on the first of February, 1913."

Clauses 7 to 12 dealt with certain life policies and other property.

"13. It is distinctly agreed that neither of the parties hereto will have any right to make any complaint in the future, of the conduct of the other. The rights of each shall be precisely as though neither were married in regard to their conduct."

From January, 1913, the plaintiff and defendant continued to reside in England, each having a separate establishment. The plaintiff from time to time received her separation allowance by remittances sent either to her or to her nominees as and when and where she required it, and such remittances were charged against the defendant's banking account at Philadelphia.

In February, 1915, the defendant took a lease for seven, fourteen, or twenty-one years of the house No. 2, Brook Street, Grosvenor Square, and decorated and furnished it at a cost of about 5000*l*. In May he expressly informed the plaintiff of his determination to get rid of the separation deed and of his intention to go to Paris to obtain a divorce according to the law of France. In June he broke up his establishment at No. 2, Brook Street, closed the house and placed it in the hands of estate agents for sale, removed the bulk of the furniture to his apartments in Paris, and stored the rest of it in London; at the same time he

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applied to the French authorities for naturalization as a French citizen.

On July 3 the plaintiff issued the writ in this action to enforce the provisions of the separation deed, and on July 8 obtained leave under Order XI., r. 1 (*c*), to serve notice of the writ on the defendant in Paris, where he was then living, on the ground that he was ordinarily resident in England. The defendant entered a conditional appearance, and on July 20 gave a notice of motion to discharge the service of the writ upon him and to set aside all subsequent proceedings thereunder, and in his affidavit in support alleged (amongst other things) that he was not domiciled or ordinarily resident within the jurisdiction of the Court, and that there had been no breach by him within the jurisdiction of the Court of any contract on his part contained in the separation deed which according to the terms thereof ought to be performed within such jurisdiction.

Dec. 15. The motion now came on for hearing, and a considerable body of evidence had been filed, including affidavits by the defendant on the question of domicil and residence. The usual notice had been given on behalf of the plaintiff for the defendant to attend before the Court for cross-examination on his affidavits. He did not attend, and put in affidavits by his French counsel and solicitor to the effect that, if he did so, it might imperil his position in the divorce proceedings he had instituted in the French Courts, but he expressed his willingness to attend for cross-examination on a commission at any place in France. Objection was taken to his affidavits being read, and after some discussion it was agreed, at the suggestion of the Court, that his affidavits should be read subject to any observations that might be made on his non-attendance at the Court.

P. O. Lawrence, K.C., *Hon. Frank Russell, K.C.*, and *Austen-Cartmell*, for the motion. The plaintiff's sole ground in her affidavit for this service out of the jurisdiction is that the defendant is now ordinarily resident in England. She does not allege in it that he is domiciled in England nor any breach of contract, and she is bound by her affidavit: *Parker* v. *Schuller*. (1) On the question of domicil,

(1) (1901) 17 Times L. R. 299.

there is no sufficient evidence that the defendant has changed his domicil of origin. But if he did acquire a domicil of choice in England, whatever happened before June, 1915, is immaterial, because he did in that month break up his establishment in Brook Street and went to Paris with the intention to acquire the necessary legal domicil in France so as to divorce his wife. That involved his giving up the lease of the house in Brook Street and making France his only place of residence. It is submitted that on our evidence the defendant did completely sever his connection with England in June, 1915, and could not be described at the date of the writ as ordinarily resident in England, although he did not get his conditional grant of French naturalization until November, 1915. His motive for making the change is immaterial even if his intention was to avoid the jurisdiction of this Court. Lastly, the separation agreement is not a contract to be performed in this country. It was made in America and must be construed according to American law. No place for payment of the allowance is mentioned, and there is no express or implied stipulation that payment must be in England. It can be performed anywhere, and payments have been made in America. The cases on r. 1 (*e*) show that the words "ought to be performed" in England are to be read "must be performed" in England: *Rein* v. *Stein* (1); *Comber* v. *Leyland*. (2) In *Charles Duval & Co.* v. *Gans* (3) it was obvious that the money had to be paid in England. Here it cannot be said that on the terms of this agreement the defendant was bound to pay the allowance in England. It can be paid wherever either party happens to be. Therefore it cannot be said that this is a contract which by its terms was to be performed, as to any part of it, in England.

Sir E. Carson, K.C., H. E. Duke, K.C., and *Hon. M. Macnaghten*, for the plaintiff.

[NEVILLE J. I do not require to hear you on the construction of the contract.]

Then there remain the questions of domicil and ordinarily resident. It is submitted on our evidence that the defendant abandoned his domicil of origin and made his permanent home in this country and acquired an English domicil, and it is for him to show that he

(1) [1892] 1 Q. B. 753. (2) [1898] A. C. 524.
(3) [1904] 2 K. B. 685.

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ceased to be resident here, if at all, in the summer of 1915. But in February, 1915, he took a lease of No. 2, Brook Street for a term of years and stayed at the Ritz Hotel whilst the house was being decorated, and on June 29 he executed the lease of No. 2, Brook Street, as he was bound to do. We submit that he had a residence at Brook Street at the date of the writ and can still be sued here, and we ask the Court not to accept his evidence when he does not come here for cross-examination. The Court must be satisfied on the evidence that he really permanently abandoned his domicil here to acquire a new domicil in France and to reside there permanently: *King* v. *Foxwell*. (1) If his going there was a mere pretence and for a limited period for a particular purpose, that will not do. The Court can go into the motives and bona fides of a change of residence: *In re Craignish* (2); *Pitt* v. *Pitt* (3); *Le Mesurier* v. *Le Mesurier*. (4) Here he went to Paris because he wanted to get rid of the separation deed and to obtain a divorce according to the law of France, and it is submitted that he has not really abandoned his residence here and was at the date of the writ ordinarily resident in England. He did not present his petition of divorce in Paris until July 29, and his conditional grant of French naturalization, which he did not obtain until November, 1915, does not oust his English domicil.

Hon. Frank Russell, K.C., in reply, on the question of domicil cited *Winans* v. *Attorney-General* (5); *Marchioness of Huntly* v. *Gaskell*. (6)

NEVILLE J. There are three points to consider in this case: First, whether at the time of the issue of the writ the defendant was ordinarily resident in England; secondly, whether he was at that date domiciled in England; and thirdly, whether the action is founded on a breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction. It is said that the only point I can decide is the question of whether the defendant was ordinarily resident in England at the date of the issue of the writ, and that argument is founded upon the contents of the plaintiff's

(1) (1876) 3 Ch. D. 518, 520.
(2) [1892] 3 Ch. 180.
(3) (1864) 4 Macq. 627, 639—640.
(4) [1895] A. C. 517, 538.
(5) [1904] A. C. 287.
(6) [1906] A. C. 56.

affidavit upon which the Court made the order permitting notice of the writ to be served upon the defendant. The plaintiff by her writ undoubtedly sues under the agreement of January 20, 1913, and when I look at her affidavit upon which the order for service of notice of the writ was made I find that she refers to the agreement which is the subject-matter of the action and sets out the terms of it, and particularly the term " That my husband should pay to me during his lifetime the monthly payments therein specified " ; and then she says, " In the year 1897 my husband and I came over from the United States of America to this country and we permanently established our matrimonial home here until we separated in 1911. Since then both of us, living separate and apart, have continued to be and we now are ordinarily resident within the jurisdiction of this honourable Court." It is said that that does not give adequate notice of the points which have been raised in the argument with regard to the question of domicil and with regard to the question of the terms of the contract. But when I turn to the defendant's notice of motion I find that the first ground upon which he moves to have the notice set aside is " that the defendant is not domiciled or ordinarily resident within the jurisdiction of this honourable Court." Therefore it is quite clear that he accepted the challenge on the part of the plaintiff and quite understood that, to succeed upon his motion, he had to show he was not domiciled or ordinarily resident within the jurisdiction of the Court. Then, after dealing with some other matters, he says " That there has been no breach or alleged breach by the defendant within the jurisdiction of this honourable Court of any contract on his part contained in the said agreement or instrument which according to the terms thereof ought to be performed within such jurisdiction." The evidence before me deals with every one of those points, and it appears to me, therefore, that on the present application it is the duty of the Court to consider them all, and if on any one of them the plaintiff is entitled to maintain her action against the defendant, although he is living in Paris, the motion must fail.

With regard to the question of domicil the facts are these. [His Lordship referred to the facts and held that there was abundant evidence to show that the defendant had abandoned his domicil of origin and had acquired a domicil in England, and

NEVILLE J. continued :] I will take the two points of domicil and ordinary residence together. With regard to the question of ordinary residence, I think that undoubtedly the ordinary residence of Mr. Drexel until a good way on in 1915 was England—in London. He has filed evidence in which he has set up a case of no domicil in England and an ordinary residence in France for a considerable number of years. I must say that, having regard to the evidence that has been filed on the other side, the evidence he has given in that respect is entirely unreliable. It was desired to cross-examine him upon his own affidavits. He has declined to submit himself to cross-examination upon grounds which seem to me totally inadequate and irrelevant. Consequently, although his evidence has been read and although I have taken it into careful consideration, I have less hesitation in saying that, having regard to the conflict of testimony, his evidence is not to be relied upon than I could have had if he had submitted himself to cross-examination and had the truth of his evidence tested.

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That being so, I approach a very curious set of facts. Mr. Drexel in 1913 had been threatened with proceedings for divorce in America. At that time he was desirous that his wife should not divorce him, and in January, 1913, he entered into an agreement with her under which, amongst other things, he covenanted to make her an allowance of 50,000 dollars a year. As time went on, he became dissatisfied with that arrangement and desired a complete separation from his wife by divorce, and suggested to her through members of her family that she should take proceedings in France to divorce him. This she declined to do, and he threatened that if she would not do so he himself would proceed to France and take proceedings there against her, and, as a means of pressure upon her to induce her to submit to the jurisdiction of the French Courts, would stop the allowance which he had agreed to make her in January, 1913. In pursuance of these threats he did leave London and proceed to Paris, did institute the divorce proceedings, dismantled his residence in London and put it in the hands of estate agents for sale, and removed the furniture, partly to France and partly to a place of storage in London. He also applied for (although at the time the writ was issued he had not obtained an order to that effect) an order, or whatever the legal

French term may be, giving him the right of domicil in France for a limited number of years. The inference I draw from these facts is that Mr. Drexel took these steps solely for the purpose of obtaining a dissolution of the marriage tie which he desired, and that beyond that he had no intention of changing his place of residence or abandoning his English domicil, but, so far as was necessary for the purpose of succeeding in the intentions which he had expressed, I have no doubt that he did intend to sever himself as completely from his English residence as he could and also from his English domicil. I am therefore faced with the extremely difficult question of whether under those circumstances he really abandoned his English domicil and really can be said to have been ordinarily resident in England at the date of the issue of the writ. I think that, inasmuch as he was doing only what he had a right to do, and inasmuch as the purpose for which he was acting showed that it was desirable for him to do so, he did intend to sever his connection with this country, for the time at all events, completely, and that he had ceased to be resident in England on July 3, 1915, and that it cannot be said his domicil of choice in England endured after his application for the domicil in France, because a man is entitled to judge for himself and to make his domicil in such a country as pleases him.

That brings me to the consideration of the third point, and that is whether the terms of the contract sued upon had to be performed within the jurisdiction of this Court. To my mind they undoubtedly had. When the agreement of January 20, 1913, was executed both Mr. and Mrs. Drexel were living in England, and there they had been resident for years and it was their fixed abode. It is quite true that the agreement was drawn up by American lawyers and was executed by Mr. Drexel in America, where he then was, and by Mrs. Drexel in England, but delivered on her account in America. Whether the result is that the contract is an American contract or an English contract does not seem to me material for the present purposes. What I have to ascertain is whether the proper legal construction of its terms involves payment to Mrs. Drexel of the allowance in England. It seems to me there can be no serious doubt about that question. If it was not payable to the creditor where she lived, where was it payable?

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It seems to me the conclusion that it was payable to the creditor wherever she might be living is necessary in order to preserve the obligation, because if the debtor is not bound to pay anywhere, it seems to me that the creditor has what may be called a right but something which can never be enforced. I think the rule of our law, and I assume the American law is the same,—at all events I have no evidence to the contrary—is that the debtor must seek his creditor and must pay him. (1) I think there is no doubt where the payment was intended to be, because Mrs. Drexel was living in England and was intending to live in England. There was no idea of change in the residence of either of the parties at the time the contract was entered into. It is said that by arrangement payment was made by drafts of some kind, which Mrs. Drexel did not seem to understand very clearly, on the American bank. But that seems to me wholly immaterial. What I have to consider is not what was done, but what the plaintiff had a right to have done under the terms of the agreement. I think she had a right to have payment made to her in England if she so desired; and that, even supposing the American payments had gone on for years, it made no difference. If she determined to stand upon her rights under the agreement, she could at any time have said to her debtor, "I direct payment to be made to my bankers in London or to me personally in England." This I think is what in effect was done. She has sued in England, as I think she has a right to sue. Can it really be suggested that she must go to New York in order to sue her husband for payment of this money, which Mr. Drexel never had from first to last the smallest intention of paying except to and for her use in England? I think Mrs. Drexel being in England had a right to have payment in England and to issue her writ here, and that the order made for service of notice upon the defendant in Paris was right. I think the case comes within r. 1 (*e*) of Order XI.—in other words, that under the terms of the agreement the contract to pay was to be performed within the jurisdiction of this Court. The motion therefore fails and must be dismissed with costs.

Solicitors for plaintiff: *Withers, Bensons & Co.*
Solicitors for defendant: *Bircham & Co.*

(1) Co. Litt. 210 b.

H. L. F.

GLYN *v.* WESTON FEATURE FILM COMPANY.

YOUNGER J.

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Nov. 5 9 ; *Dec.* 21.

[1915 G. 943.]

Copyright—Infringement — Novel — Cinematograph Film — Burlesque— Immoral Tendency—Plaintiff's Right to maintain Action—Copyright Act, 1911 (1 *& 2 Geo.* 5, *c.* 46), *ss.* 1, 7.

The plaintiff brought this action for the alleged infringement of her copyright in a novel by the sale and exhibition of burlesque cinematograph films, substantial parts of which were alleged to be reproductions of her novel. The plaintiff claimed an injunction, damages, or alternatively an account of profits, and the delivery up of all infringing films :—

Held, as a conclusion of fact, that the films did not constitute any infringement of the plaintiff's copyright in the novel.

The question of the possible infringement of copyright in a serious work by a burlesque or caricature considered.

Held, also, that the plaintiff's novel, being of a highly immoral tendency, was in any case disentitled to the protection of the Court, and that on this ground also the action failed.

Held, also, that the films themselves contained incidents of an indecently offensive character such as would have equally disentitled them to the protection of the Court, and that, inasmuch as the plaintiff in her action as framed was adopting and claiming the benefit derived from the films, on this ground also the action failed.

Action dismissed, but, under the circumstances, without costs to either party.

Witness Action.

The plaintiff by her statement of claim alleged that she was the author and owner of the copyright in a literary work being a novel intituled "Three Weeks"; that the defendants had sold and authorized the public exhibition of cinematograph films under the title of "Pimple's Three Weeks (without the Option)," which reproduced substantial parts of the plaintiff's novel; and claimed (1.) an injunction to restrain the defendants from selling, letting, or authorizing the public exhibition of the films or otherwise infringing the plaintiff's copyright; (2.) damages, or alternatively an account of profits; (3.) delivery up of all infringing films; (4.) costs; and (5.) such further or other relief as the nature of the case might require.

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The defendants to the action were the Weston Feature Film Company and George Black, but the action now came on for trial against the defendant company alone, having so far as George Black was concerned been settled in the course of the proceedings. The defendant company by their defence did not admit that their films reproduced substantial or any parts of the plaintiff's novel, or that the plaintiff's copyright had been infringed, and pleaded that the subject of their films was an original dramatic work within the meaning of the Copyright Act, 1911.

The characteristic features of the novel and the films (a representation of which was seen by his Lordship) are sufficiently stated in the judgment.

Clauson, K.C., and *E. J. Macgillivray*, for the plaintiff. By the Copyright Act, 1911, s. 1, sub-s. 2, "copyright" includes the sole right in the case of a novel to convert it into a dramatic work by way of performance in public (s. 1, sub-s. 2 (*c*)), and also in the case of a literary work the sole right to make any "cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered" (s. 1, sub-s. 2 (*d*)); and by s. 7 the infringing films are to be deemed to be the property of the owner of the copyright. Sect. 2 creates certain exceptions, none of which, however, affect the present case. This Act has radically altered the law, and copyright now extends to the plot of a literary work. "Literary work," by s. 35, sub-s. 1, includes "maps, charts, plans, tables, and compilations," and a mere play without words would be infringed by a cinematograph film of the movements of the actors. The Act contemplates the infringement of a literary work through a different medium, and this is what the defendant company has done, and none the less because the medium is a distorted one which vulgarizes the plaintiff's work. A substantial part of the pleasure which the spectator derives from the film is due to its resemblance to the plaintiff's book. *Corelli* v. *Gray* (1) is analogous to the present case: see too *Rees* v. *Melville or Robbins* (2); Copinger on Copyright, 5th ed. p. 171.

(1) (1913) 30 Times L. R. 116; Macgillivray's Copyright Cases, 1913, 107.

(2) (1914) Macgillivray's Copyright Cases, 1914, 168; *The Times*, Feb. 6, 1914; on appeal, July 4, 1914.

It is suggested against us that a genuine burlesque can never be an infringement of the copyright in a serious work, but that proposition is far too wide. A burlesque such as this involves the taking of a substantial part of the novel. It takes the framework on which the representation is built, and the purpose for which the framework is taken is immaterial. The principle is illustrated by *Weatherby & Sons* v. *International Horse Agency and Exchange*. (1)

H. Terrell, K.C., and *C. Hartree*, for the defendant company. It is impossible to say that the film is a record of the plaintiff's literary work within s. 1, sub-s. 2 (*d*), of the Copyright Act, 1911. There is no similarity whatever between the two. The plaintiff's book purports to be a psychological study, while the film is a screaming farce. It is submitted that, if you find one work which is a serious work and another which is a burlesque of it, the latter is not an infringement of the copyright in the former. It is a new work. On any other view of the case every caricature of an Academy picture in *Punch* could be stopped. Can it be said that the Comic Blackstone was an infringement of Blackstone's Commentaries? Burlesque is merely a form of criticism. The same rule must apply whether it is the caricature of a picture or the burlesque of a play or novel: *Hanfstaengl* v. *Empire Palace*. (2) The true test is one of intention: Was it intended to copy the work or to produce a caricature? If the intention was to produce a mere caricature or burlesque, then there is no infringement. There is no case in the books in which the contrary has been held, and yet burlesque, frequently more famous than the original work, is as old as Aristophanes. If the burlesque is made maliciously the plaintiff's remedy is to bring an action for slander of title. In the present case the plaintiff cannot have suffered any injury to her proprietary rights by what the defendants have done. On the facts it is submitted that the defendants have not taken any substantial part of the plaintiff's work. [They referred to *Rees* v. *Melville or Robbins* (3), *Corelli* v. *Gray* (4), Copinger on Copyright, 5th ed. pp. 169 et seq., and *Walter* v. *Lane*. (5)]

(1) [1910] 2 Ch. 297.

(2) [1894] 3 Ch. 109, 130, per Lindley L.J.

(3) Macgillivray's Copyright Cases, 1914, 168; *The Times*, Feb. 6, 1914; on appeal, July 4, 1914.

(4) 30 Times L. R. 116; Macgillivray's Copyright Cases, 1913, 107.

(5) [1900] A. C. 539.

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Clauson, K.C., in reply.

[YOUNGER J. In comparing a literary work with a cinematograph film, is not the plot the really material thing ?]

Only if the word " plot " is used in a wide sense so as to include the scenic effects and incidents. If it suits the infringer to take incidents from the novel he cannot at the same time take the benefit and deny the materiality. Before the recent Act there was no infringement of dramatic copyright in the absence of the reproduction of actual verbal composition: *Tate* v. *Fullbrook* (1); *Karno* v. *Pathé Frères* (2); but since the Act it is different, and the appropriation of scenic effects and accessorial matters suggested by the novel constitutes an infringement. It is not suggested that the exception of fair criticism contained in s. 2, sub-s. 1, is applicable here.

[YOUNGER J. referred to *Chappell & Co.* v. *Columbia Graphophone Co.* (3)]

The question is not affected by the different objects of the plaintiff and the defendants, nor by the fact that the defendants have not taken the features in the plaintiff's work for which she claims especial merit. Merit has no bearing on originality: *Maple & Co.* v. *Junior Army and Navy Stores.* (4)

[YOUNGER J. A further point is pressing me. If I should come to the conclusion that the plaintiff's novel is of such a character as to disentitle it to the protection of the Court, her action must of course fail; but, assuming that the copyright in the novel is entitled to protection and that I should then come to the conclusion that the defendants' films themselves are of such a character that they would be disentitled to the protection of the Court in any action for infringement brought by the defendants, can the plaintiff in a copyright action, which adopts and claims the benefit derived from the infringing films, stand in any better position than the defendants ? Is not her proper remedy by way of action for slander of goods or reputation, and not for the infringement of copyright ?]

No; copyright is property, and the plaintiff is entitled to defend her property by an action for infringement, notwithstanding that

(1) [1908] 1 K. B. 821.
(2) (1908) 24 Times L. R. 588; affirmed (1909) 25 Times L. R. 242.
(3) [1914] 2 Ch. 745.
(4) (1882) 21 Ch. D. 369.

the defendants in appropriating her work have added the element of indecency. The plaintiff in such an action cannot be placed in a worse position because the defendant has not only stolen but besmirched the original. In any case the plaintiff's right to an injunction would not be affected.

C. Hartree commented on the cases cited in reply and referred to Copinger on Copyright, 5th ed. p. 169, and to an American case of *Daly* v. *Palmer* (1) there cited, and *Hanfstaengl* v. *Baines & Co.* (2)

G. R. Northcote appeared for the defendant George Black, but took no part in the argument.

Cur. adv. vult.

Dec. 21. YOUNGER J. delivered the following written judgment:—This is an action to stop the alleged infringement by means of a cinematograph film of the plaintiff's statutory copyright in a novel, to recover damages or an account of the defendants' profits in respect of the cinematograph representations and sales of the films already given and made, and to have the offending films in the possession of the defendants delivered up to the plaintiff.

The action was originally brought against two defendants, the Weston Feature Film Company and George Black. The defendant Black was settled with in the course of the proceedings, and the action was brought to trial only as against the Weston Feature Film Company. Although some distinction between the position of the two defendants appears in the pleadings, no point was made of this at the trial, and the defendant company, assuming full responsibility both for sales and representations of the film complained of, denied that the plaintiff was entitled as against them to any of the relief claimed by her in the action.

The plaintiff is the authoress of the novel in debate. It is entitled "Three Weeks." First published in 1907, the book was from the point of view of notoriety fortunate enough to be condemned almost unanimously by the critics and to be banned by all the libraries. In consequence, I doubt not, of these attentions it has enjoyed a vogue denied to less daring rivals, and it has reached a sale in this

(1) (1868) 6 Blatch. 256.
(2) [1895] A. C. 20, 30, 31, per Lord Shand.

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country and America in numerous editions, expensive and cheap, of, I was told, far over a million copies.

The book is said to be an episode in a young Englishman's life without any real beginning or end. In a sense this is a correct enough description of the novel, but the episode referred to absorbs little more than half the book—160 pages out of a total of 319. The rest is taken up with a description of the young man's life and surroundings before the episode commenced and with a portrayal of the permanent influence upon his moral character and career which the authoress is pleased to attribute to the experience he went through during the episode in question.

The episode itself is a chance meeting at a Lucerne hotel between a beautiful lady of uncertain age and mysterious origin and the young Englishman sent by his parents on the grand tour to cure him of an unsuitable attachment at home. The meeting developed into a liaison which lasted for three weeks, after which the lady returned to the shadowy realm from which she had emerged and of which she was, as it happened, the queen. There, having given birth to a son of whom the young Englishman was the father, she was murdered by her husband, the dissolute king of the country. He in turn was assassinated by a faithful attendant of the queen's, leaving the child, the image of his handsome English father, to succeed to the throne.

In all its essentials the so-called episode is as hackneyed and commonplace a story as could well be conceived. If it is to be distinguished at all from innumerable anticipations in erotic literature, the distinction is to be found in the accessories of the tale. Mystery surrounds the lady. Of a loveliness unaffected by the passage of time, she is said to be polished, *blasée, soignée.* Even in a Swiss country hotel, but notably at Lucerne and Venice, she is pervaded by a luxury as sybaritic as it is incongruous : no wine can pass her lips which is not either of the deepest red or the richest gold ; the roses she wears are matched in colour only by the red of her lips ; the fruit with which she toys has to be out of season in order that it may be fabulously expensive. Although attended only by an elderly dignified male servant, the lady apparently carries about with her to Lucerne and Venice—if one may omit so-called mountain excursions to the Righi and the Burgenstock—baggage

sufficient to fill an ordinary train; it is no extraordinary achievement for her dignified attendant in the space of a week-end to go from Lucerne to Venice, engage a palace on the Grand Canal, supplied with the essential convenience of a side door, and have it equipped with a retinue of Italian servants and, it would seem, an orchestra from Paris, in time to receive the lady on the following Monday travelling from Lucerne with all her baggage and apparently quite unaccompanied. These exaggerated incidents or others like them are of course quite absurd enough to be destitute of novelty in literature of the kind; but if the particular *cachet* of the plaintiff's novel is not to be found in this setting, then, so far as I can see, it has no *cachet* at all. At the best, the plaintiff has chosen a hackneyed theme for her episode, and her privilege as an authoress must be strictly confined to the method of treating it which she has adopted.

Now the defendants' film, which is styled "Pimple's Three Weeks (without the Option)," is frankly farcical and is vulgar to an almost inconceivable degree. Designed to "feature" the performance of a male artist who rejoices in the sobriquet of "Pimple," whose speciality appears to be the impersonation of females of truly hideous mien, and who takes the part of the lady, the result is that "Pimple" holds the centre of the stage throughout and dominates the film to the almost entire exclusion of the young man, as of everybody else. The young man's previous history and subsequent career, of which so much is made in the novel, have no place in the film, while on the other hand the lady's previous home experiences, during which incidentally she is depicted as a common vulgar scold, and all of which are entirely absent from the novel, monopolize the greater part of the film. The meeting in the novel between the lady and the young Englishman amid the surroundings of extravagant luxury to which allusion has already been made becomes in the film a meeting between "Pimple" and the young man at one of Lockhart's coffee-houses amid every accompaniment of the broadest farce; and the incidents of the film to which even so remote a resemblance with any in the novel can be found are exceedingly few in number or importance. The great bulk of the film is taken up with happenings which have no counterpart in the novel; a great part of the novel is taken up with other incidents

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which have no counterpart in the film; and on the whole, after a careful consideration of both, and after the opportunity which was afforded me of seeing a representation of the film, I have arrived at the conclusion of fact that the film does not constitute any infringement of the plaintiff's copyright in the novel.

Of course no part of the letterpress is reproduced, and so far as there is any similarity of incident those of the film are so altered in effect and feeling and surrounding as to reproduce no element of any situation described in the novel for which the plaintiff can, as I think, claim any monopoly right at all.

This view of the case makes it unnecessary for me to do more than refer in passing to the important point raised by the defendants that their film is a mere burlesque of the plaintiff's novel, and that a genuine burlesque of a serious work constitutes no infringement of copyright although it may under certain conditions justify an action in the nature of slander of goods.

Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it certainly is remarkable that no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found involved in such observations as those of Lindley L.J. in *Hanfstaengl* v. *Empire Palace* (1), or in such a decision as that of the Court of Appeal in *Francis, Day & Hunter* v. *Feldman & Co.* (2), or in the principle that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result. The same principle is

(1) [1894] 3 Ch. 109, 128. (2) [1914] 2 Ch. 728.

illustrated in the law of designs by such cases as *Thom* v. *Syddall* (1) and *Barran* v. *Lomas* (2); and if, in considering whether such a literary work as a novel has been infringed by such a thing as a cinematograph film, the true inquiry is, as I think it must be, whether, keeping in view the idea and general effect created by a perusal of the novel, such a degree of similarity is attained as would lead one to say that the film is a reproduction of incidents described in the novel or of a substantial part thereof, then in my opinion the answer in the present case must be in the negative. If, therefore, it were necessary for me to express an opinion upon this aspect of the case I should decide that on this ground also the plaintiff fails.

But there is involved in this case another and from the public point of view a much more important consideration which in my judgment entirely debars the plaintiff from obtaining any relief in this Court. The episode described in the plaintiff's novel, and which she alleges has been pirated by the defendants, is in my opinion grossly immoral in its essence, in its treatment, and in its tendency. Stripped of its trappings, which are mere accident, it is nothing more nor less than a sensual adulterous intrigue. And it is not as if the plaintiff in her treatment of it were content to excuse or palliate the conduct described. She is not even satisfied with justifying that conduct. She has stooped to glorify the liaison in its inception, its progress, and its results; and she has not hesitated to garnish it with meretricious incident at every turn.

Now it is clear law that copyright cannot exist in a work of a tendency so grossly immoral as this, a work which, apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome. It may well be that the Court in this matter is now less strict than it was in the days of Lord Eldon, but the present is not a case in which in the public interest it ought, as it seems to me, to be at all anxious to relax its principles. We are constantly hearing of the injurious influence exercised upon the adventurous spirit of our youth by the penny dreadful which presents the burglar in the guise of a hero and so excites the imagination of the juvenile reader that, adopting

(1) (1872) 26 L. T. 15. (2) (1880) 28 W. R. 973.

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in the spirit of true adventure the life of his idol, he presently finds himself in the dock branded by an unfeeling world as a common thief. So is a glittering record of adulterous sensuality masquerading as superior virtue, as it does in this book, calculated, with consequences as inevitable as they are sure to be disastrous, to mislead into the belief that she may without danger choose the easy life of sin many a poor romantic girl striving amidst manifold hardships and discouragements to keep her honour untarnished.

It is enough for me to say that to a book of such a cruelly destructive tendency no protection will be extended by a Court of Equity. It rests with others to determine whether such a work ought not to be altogether suppressed.

With one remaining aspect of this case I must deal. In her statement of claim the plaintiff in ordinary terms claims that the defendants' film reproduces substantial parts of her novel, and she alleges that the defendants have in their possession a number of the infringing films and that the defendants detain the same from her: she asks for damages, or alternatively for an account of profits. In other words the plaintiff's statement of claim is based upon the footing that the films are in law her own, and she claims their delivery up to her under s. 7 of the Act. This renders it necessary for me to say a word about the film. It is, as I have already indicated, indescribably vulgar; but vulgarity is merely a question of taste, and with that I have here no concern. There are, however, in it isolated incidents and movements which in my judgment are more than vulgar; they are indecently offensive. The presence of these incidents in the film as I think disentitles it in its present form to protection in this Court, and would preclude the defendants as the owners of the film from maintaining any action for infringing it. It was, I do not doubt, permissible for the plaintiff, instead of framing her claim as she has done, indignantly to stigmatize the defendants' film as being not only an infringement of her copyright, but a libel upon her book, and I have no doubt that in an action so framed, provided of course that the libel had not been justified, it would have been possible for her had she proved her allegations to recover from the defendants damages for the injury to her property occasioned by this defamatory representation of it. But that is not the gist of the plaintiff's action, and no

hint was given either in the pleadings or in the opening of her case that she had any such grievance against the defendants. Her whole case as pleaded and presented was that not only is she entitled to have the films delivered up to her as her own, but that she is entitled to the profit which the defendants have made by the appropriation of her property, or alternatively to damages which would be assessed upon the footing that every film sold is to be treated as the plaintiff's so that she recover the profit which she would have received had the sale of the film been made by herself: see *Pike* v. *Nicholas*. (1) Such a presentation of her case has of course the advantage that it cannot be defeated by any plea of justification, but it has the disadvantage that the plaintiff accepts as her own work the defendants' production just as it stands, indecency and all, and it is quite clear in my opinion that, if the defendants' film truly bears the character which I hold it to bear, no inquiry as to damages nor any account of profits arising from it can or will in an action framed as this is be directed by the Court. On this ground also the plaintiff's claim in my judgment fails.

Under ordinary circumstances the action is one which would be dismissed with costs, but this is a case in which, as it appears to me, the Court owes it to its own self-respect to render no assistance whatever to either of the parties in respect of the subject of their litigation, and therefore I feel it my duty while dismissing the action to leave both parties to bear their own costs.

Solicitors: *Field, Roscoe & Co.; Bower, Cotton & Bower; Snow, Fox & Higginson, for William Bell & Sons, Sunderland.*

(1) (1869) L. R. 5 Ch. 251, 260, n.

A. C.

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1916
Jan. 19, 20.

In re HALL-DARE.
LE MARCHANT *v.* LEE WARNER.

[1915 H. 2620.]

Will—Construction—Difficulty occasioned by Language of Testatrix—Costs—Provision for Payment of Future Duties—Payment of Legacy to Legatees in whom was Entire Interest as Trustees for themselves—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 14B.

Testatrix by her will bequeathed to H. a legacy of 8000*l.* "and in the event of his death unmarried to his mother B.," and gave the residue of her estate to D. The will contained no directions as to the incidence of testamentary expenses and the legacy had not been separated from the general estate. Questions having arisen as to the interests taken by H. and B. respectively in the legacy, the executor took out an originating summons for their determination and expressly asked that the costs of the application might be paid out of the legacy :—

Held, on the construction of the gift, that the legacy vested absolutely in H. on the death of the testatrix, but subject to a gift over to B. in the event of his dying a bachelor, and, by consent, the legacy, less legacy duty, was ordered to be paid to the two legatees as trustees for themselves according to their respective interests in it.

Held, also, that the necessity for the summons was entirely attributable to the ambiguity of the language used by the testatrix herself, and that the costs of the summons were accordingly costs of administration and therefore payable as between solicitor and client out of the residue.

Trethewy v. *Helyar* (1876) 4 Ch. D. 53 ; *Eyre* v. *Marsden* (1838) 4 My. & Cr. 231 ; and *In re Giles* (1886) 55 L. T. 51 followed.

Attorney-General v. *Lawes* (1849) 8 Hare, 32, and *Martineau* v. *Rogers* (1856) 8 D. M. & G. 328 explained.

Held, further, that r. 14B of Order LXV. did not apply to a case where the difficulty necessitating the application was directly attributable to the imperfect phraseology of the testatrix herself.

ADJOURNED SUMMONS.

Mrs. Alice Mary Hall-Dare by her will dated March 12, 1915, after appointing Gaspard Le Marchant executor thereof, made the following bequest :—"To my step grandson H. Granville Lee Warner R.F.A. I bequeath 8000*l.* and in the event of his death unmarried to his mother B. Lee Warner." The testatrix then made

various other pecuniary and specific bequests and gave the residue of her estate to her niece Dora Le Marchant.

The testatrix died on May 22, 1915.

This was an originating summons taken out by the executor against H. G. Lee Warner and his mother, Mrs. Lee Warner, for the determination (inter alia) of the following questions :—(1.) Whether the legacy of 8000*l.* vested in the defendant H. G. Lee Warner absolutely on the death of the testatrix and was now payable to him, or whether it was subject to a gift over to the defendant Mrs. Lee Warner in the event of his dying unmarried ; and (2.) if the legacy was subject to such gift over, whether the defendant H. G. Lee Warner would become absolutely entitled to the legacy and to receive payment thereof upon his marriage, or whether the same would remain subject to a gift over to the defendant Mrs. Lee Warner in the event of his not having a wife living at the date of his death, or in any other and what event. The summons also expressly asked that the costs of all parties to the application might be paid out of the legacy.

Percy Wheeler, for the plaintiff.
W. R. Sheldon, for the defendant H. G. Lee Warner.
Bryan Farrer, for the defendant Mrs. Lee Warner.

YOUNGER J. answered questions 1 and 2 of the summons by declaring that the legacy vested absolutely in the defendant H. G. Lee Warner on the death of the testatrix, but subject to a gift over to the defendant Mrs. Lee Warner in the event of his dying a bachelor, but not otherwise.

The question as to the payment of the costs, which was the only one calling for a report, was then argued.

Dora Le Marchant, the residuary legatee, was not a defendant to the summons, but *Percy Wheeler* having stated that he was instructed he might appear for her, the Court directed that the summons should be amended by adding her as a defendant and that her name should be added to his brief.

Percy Wheeler, for the residuary legatee. The executor being ready and anxious to pay the legacy of 8000*l.* out of the residue

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and only wishing to know into whose hands he ought to pay it, the costs of the present application ought not to come out of the residue, but out of the legacy itself: *Attorney-General* v. *Lawes* (1); *Martineau* v. *Rogers* (2); *Jenour* v. *Jenour*. (3)

Order LXV., r. 14B, which provides that "The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct," applies to this case. The costs here were incurred in relation to the legacy. The latter part of North J.'s judgment in *In re Groom* (4) is dictum which is not supported by authority.

[YOUNGER J. The executor has come here to ask what he ought to do having regard to the ambiguity of the language used by the testatrix. I do not see why the legatees themselves should bear the costs of this summons.]

It is admitted that the difficulty was created by the testatrix herself and by the question as to what duty was payable. If there had been a provision in the will directing the executor to pay testamentary expenses the case would have been covered by *In re Groom*. (5) There is nothing in this will to say that testamentary expenses are to be paid out of residue. The executor might have paid the legacy into Court after deducting his costs. The residue ought not, it is submitted, to be mulcted of the costs of this summons. The two defendants might have come to some arrangement between themselves as to the legacy, in which case it would not have been necessary for the executor to make the present application.

W. R. Sheldon, for the defendant H. G. Lee Warner. It is a well settled rule that there can be no residue until all the costs of the administration of the estate have been paid: *Trethewy* v. *Helyar* (6); *Eyre* v. *Marsden* (7); *In re Giles* (8); and this is so whether or not the will contains any directions as to the payment of testamentary expenses.

Before the introduction of the procedure by originating summons it would have been necessary in a case like the present for the

(1) 8 Hare, 32.
(2) 8 D. M. & G. 328.
(3) (1805) 10 Ves. 562, 571.
(4) [1897] 2 Ch. 407, 411.
(5) [1897] 2 Ch. 407.
(6) 4 Ch. D. 53, 56.
(7) 4 My. & Cr. 231.
(8) 55 L. T. 51.

executor to commence an action for administration of the estate. Inquiries would then have been directed as to the persons entitled to the legacy and the matter would have been dealt with on further consideration and the costs of all parties directed to be paid out of the residue of the estate. Under the procedure by originating summons administration of the estate in such a case is no longer necessary, but the particular question may be decided by the Court, and the same rule is followed as to costs.

Rule 14B of Order LXV., upon which reliance is placed by the executor, has no application to a case where, as here, the difficulty has been occasioned by the testatrix herself: *In re Clarke.* (1)

The executor was bound to come to the Court to ascertain who were the persons entitled to the legacy in order that he might know what duty was payable. If he had induced the two defendants to come to an arrangement as to the legacy, that would not have got rid of the difficulty, for the executor would still have had to settle with the Revenue authorities as to the duty payable on it. It is submitted, therefore, that the costs of this application are properly payable out of the residue.

Bryan Farrer, for the defendant Mrs. Lee Warner, adopted the same argument.

Percy Wheeler in reply. It would no doubt have been wrong for the executor to incur the unnecessary expense of paying the legacy into Court. His proper course was to proceed by originating summons. But this alteration of the practice does not relieve the legatee from the costs which he would have had to bear if the legacy had been paid into Court. If the money had been paid into Court, the Court would not have parted with it until the duty had been paid.

Jenour v. *Jenour* (2) and *Martineau* v. *Rogers* (3) show that where a legacy has been severed from the residue and a question arises respecting it the costs of determining the question come out of the legacy itself. Those two cases also show that it is possible to obtain a decision on the construction of a part of a will dealing with a part only of an estate without a general order for administration being made. It is competent for a testator to direct how his testamentary expenses are to be paid.

(1) (1907) 97 L. T. 707. (2) 10 Ves. 562.
(3) 8 D. M. & G. 328.

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[YOUNGER J. What was the practice of the Court between 1883, when the procedure by originating summons was introduced, and 1893, when r. 14B of Order LXV. was introduced?]

Prior to 1883 it would have been proper to pay the fund into Court, in which case the costs would have been paid out of residue. Between 1883 and 1893 there was no settled practice as to the incidence of costs in the case of particular legacies.

Cur. adv. vult.

Jan. 20. YOUNGER J. This is a summons taken out by the executor of the will of the late Mrs. Alice Mary Hall-Dare asking whether a legacy of 8000*l.* given by the will to the defendant Harry Granville Lee Warner vested in him absolutely on the death of the testatrix so as now to be payable to him, or whether the legacy is subject to a gift over in favour of the defendant Mrs. Lee Warner in the event of the legatee dying unmarried. The summons also raises the question whether the expression in the will "in the event of his death unmarried" means "dying without ever having been married," or whether it means "dying without leaving a wife living at his death." It further expressly asks that the costs of all parties may be paid out of the legacy.

I have disposed of the questions of construction raised by the summons and have decided that the legacy is subject to a gift over on the death of the legatee unmarried and that the expression "unmarried" means "without ever having been married." The result, in effect, is that the first question is answered in favour of one defendant and the second question in favour of the other. I am now asked on behalf of the residuary legatee to direct that the costs of the summons shall be paid out of the legacy.

Now the testatrix died in May of last year, and the necessity for the summons is entirely attributable to the ambiguity of the language used by the testatrix herself. The application is a perfectly proper one. It was made by the executor, and made by him without previous consultation with the defendants, and its purpose was, first, to obtain directions from the Court which would enable the executor to fix the amount of the duty payable on the legacy, and, secondly, to ascertain whether there was now any person to whom he

could properly pay the legacy, and if not, how he was to deal with the fund until there was.

The legacy has not in any sense been separated from the rest of the testatrix's estate, and the will contains no directions as to the incidence of testamentary expenses.

Now in that state of things the costs of the summons are in my opinion clearly costs of administration or testamentary expenses, and prima facie they ought to be borne by the residue, because, as has been said, until these have been paid the net residue cannot be ascertained, inasmuch as in the absence of a direction to the contrary the residue is the proper fund to bear them : see *Trethewy* v. *Helyar* (1), *Eyre* v. *Marsden* (2), and *In re Giles.* (3) And this rule as to the incidence of costs and expenses formerly applied not only to a case where the difficulty was occasioned by the testator himself, but even to the costs of ascertaining the personnel of, say, a class of persons entitled to a legacy bequeathed in perfectly unambiguous terms, or even the next of kin of a deceased person : *In re Giles.* (3) But it is said by Mr. Wheeler that this rule is inapplicable to the present case, first, upon the authority of *Attorney-General* v. *Lawes* (4) and *Jenour* v. *Jenour* (5), and, secondly, because the old rule, so far as it is applicable to a case like the present, has been altered or done away with by the provisions of Order LXV., r. 14B.

But the two cases cited by Mr. Wheeler, if referred to, are in my opinion not only distinguishable from the present case, but, when properly understood, confirm the general rule, for in both of them the legacies in question had been separated from the general estate and funds had been set apart to meet them ; in other words, all acts of administration in relation to each legacy had been completed before any question with regard to it was raised.

And as to Order LXV., r. 14B, that rule has, in my opinion, no application to a case where, as here, the difficulty necessitating the application is directly attributable to the imperfect phraseology of the testatrix herself. For that proposition I refer to *In re Groom.* (6) Order LXV., r. 14B, has, it is true, altered the incidence of costs when they are incurred in ascertaining the actual members

(1) 4 Ch. D. 53, 56.
(2) 4 My. & Cr. 231.
(3) 55 L. T. 51.
(4) 8 Hare, 32, 43.
(5) 10 Ves. 562.
(6) [1897] 2 Ch. 411.

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of a class accurately described by the testator, but it leaves unaffected the old practice where the difficulty to be solved is created by the testator himself: see further *In re Clarke* (1), which case is an authority for the view that not only in such circumstances should the costs of all parties be paid out of residue, but that these costs may, in a proper case, be taxed as between solicitor and client.

Mr. Wheeler also, relying upon the statement of Kay J. in *In re Giles* (2) that since the procedure by originating summons was introduced it was improper for executors to pay into Court under the Trustee Relief Act a legacy with respect to which a question of construction arose, pressed upon me the view that the costs of such a summons should be borne as they would have been if the legacy had been paid into Court prior to the Rules of 1883 by which that procedure was introduced. But in *In re Giles* (2), where the legacy had been paid into Court, Kay J. nevertheless threw upon the residuary estate the proper proportion of the costs which would have been incurred had the question been raised by originating summons. Therefore I can find neither authority nor principle against an order which, but for the argument of Mr. Wheeler, I should have thought in a case like the present to be a matter of course. Accordingly I think that the costs of all parties and as between solicitor and client should be paid out of the residuary estate.

Percy Wheeler, for the executor. As the defendants H. G. Lee Warner and Mrs. Lee Warner are desirous that the legacy should be paid to them jointly, and as estate duty may become payable in future in respect of the legacy under s. 14 of the Finance Act, 1914, the executor ought, it is submitted, to be protected against any such claim.

W. R. Sheldon, for the defendant H. G. Lee Warner. Even if estate duty does become payable, it will be a charge on the legacy itself and not on the residue, and the executor will not be liable for it: *In re Snape*. (3)

Bryan Farrer, for the defendant Mrs. Lee Warner. It is suggested

(1) 97 L. T. 707. (2) 55 L. T. 51.
(3) [1915] 2 Ch. 179.

that the legacy, less legacy duty, should be paid to the two defendants as trustees for themselves according to their respective interests in it.

Percy Wheeler. The executor has no objection to that being done.

YOUNGER J. I think Mr. Bryan Farrer's suggestion is a very good one, and as the executor raises no objection, I will therefore order the executor to pay the legacy, less legacy duty, to the two defendants as trustees for themselves according to their respective interests in it.

Solicitors : *Clements, Williams & Co. ; Young, Jones & Co.*

W. I. C.

In re WIX.
HARDY *v.* LEMON.

[1915 W. 2536.]

Tenant for Life and Remainderman—Lease—Surrender—Grant of New Lease for longer Term at increased Rent—Excess Rent during unexpired Period of surrendered Term—Capital or Income—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 6 (i.) ; *s.* 7, *sub-ss.* 1, 2 ; *s.* 8, *sub-s.* 1 ; *s.* 13, *sub-ss.* 1, 5, 6.

Where a tenant for life in bona fide exercise of the powers conferred upon him by s. 13 of the Settled Land Act, 1882, accepts a surrender of an existing lease of settled land and grants a new lease of the same land for a longer term at an increased rent he is entitled to retain for his own benefit the excess rent during the unexpired period of the surrendered term and no portion of it ought to be retained and capitalized by the trustees.

ADJOURNED SUMMONS.

This was an application by the trustees for the purposes of the Settled Land Acts of the settlement created by the will of Mrs. Fanny Wix, asking (inter alia) that directions might be given as to what part, if any, of the yearly rent of 2500*l.* reserved by a lease dated December 31, 1914, granted by the persons constituting the tenant for life of the settlement of certain freehold hereditaments thereby settled, ought to be set aside as capital money, and in

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particular whether the yearly sum of 1400*l.*, being the excess of the said rent over the rent reserved by a previous lease of the said hereditaments, or any part thereof, ought to be so set aside up to March 25, 1933, being the date when such previous lease would have expired if the same had not been surrendered.

The facts were as follows:—The property in question was a valuable block of freehold premises known as Nos. 2, 4, and 6a, Bishopsgate, in the city of London, settled by the will of the testatrix, who died on October 24, 1884. At the time of her death the testatrix was entitled in fee simple to the property subject to a subsisting lease in favour of the Anglo-Foreign Banking Company, Limited, dated August 21, 1874, for a term of sixty years from March 25, 1873, at a rental of 1100*l.* per annum.

By her will, dated November 1, 1882, the testatrix devised the property to legal uses under which the three first-named defendants to the summons, Mrs. Edith Louise Lemon, Mrs. Fanny Margaretta Forrester, and Mrs. Mary Alice Knowles, were now entitled as tenants in common in equal shares for their respective lives, and the persons at present interested in remainder and for an estate in fee simple were the three infant defendants Norah Wyatt Lemon, Richard Cameron Knowles, and Bryan Knowles.

By an order of Sargant J. dated December 17, 1913, the plaintiffs were appointed trustees for the purposes of the Settled Land Acts of the settlement created by the will of the Bishopsgate property.

On November 13, 1913, while nearly twenty years of the bank's lease remained unexpired, the three tenants for life entered into a conditional agreement with the Banque Belge, in whom by assignment the leasehold interest had become vested, and the Bishopsgate Estates, Limited, who had acquired an interest in the adjoining premises, under which by arrangement with the Estates Company the bank was to surrender its existing lease, and a new lease in substitution therefor of the settled property, for a term of ninety-nine years from March 25, 1914, and at a rent of 2500*l.* per annum, was to be granted to the Estates Company, who covenanted to erect on the settled property and adjoining premises new buildings at a cost of not less than 25,000*l.* The agreement was made conditional on the sanction of the Court being obtained to it, and by an order dated July 27, 1914, and made on a summons entitled "In

the Matter of the Settled Land Acts," to which the tenants for life were plaintiffs and the trustees and the infant remaindermen were defendants, Sargant J. directed that the conditional agreement above referred to for the grant by the applicants of a lease of the settled premises upon the terms therein appearing should be carried into effect, but " without prejudice to any question as to the destination of the excess rent payable until the 25th March, 1933."

A lease, in pursuance of the agreement so sanctioned, was in due course granted dated December 31, 1914, and under it the increased rent of 2500*l.* was now being paid.

Arnold Jolly, for the trustees.

H. C. Bischoff, for the tenants for life. There is no provision in the Settled Land Acts requiring rent reserved by a lease to be capitalized except in the case of minerals. There is nothing in the Act to prevent the tenants for life from receiving the whole of the rent except what may be inferred from s. 53, which makes a tenant for life a trustee for all parties interested. Sect. 13 of the Act enables a tenant for life to accept a surrender and to grant a new lease in conformity with the Act either with or without a fine.

[YOUNGER J. referred to s. 4 of the Settled Land Act, 1884.]

If a fine is taken it has to be capitalized, but the tenant for life gets the income produced thereby. It is submitted that s. 13, sub-s. 5, expressly authorizes the tenants for life to do what they did. It was open to them either to take a fine and a smaller rent or a larger rent and no fine.

[YOUNGER J. What are the leasing powers ?]

They are to be found in ss. 6 and 7. Sect. 34, which is a reproduction of s. 74 of the Lands Clauses Consolidation Act, 1845, only deals with money paid on the sale of a lease or reversion and does not apply. The point reserved by the order of Sargant J. is whether the Court will prevent the tenants for life from receiving the whole of the rent. There is nothing in the Act to prevent them from doing so.

[YOUNGER J. Under what section did you apply to Sargant J. ?]

Under s. 44 of the Act of 1882.

In *In re Rodes* (1) it was held that the consideration paid by a

(1) [1909] 1 Ch. 815.

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lessee on a surrender must be paid by instalments spread over the term to the tenant for life and the other persons for the time being entitled to the rent, and that is exactly what is being done in this case; the consideration for the surrender is represented by a reduction in the future rent throughout the whole term.

A. F. Topham (*E. Riviere* with him), for the infant remaindermen. There is nothing in the Act which says that the tenant for life is to receive the rent, but as a rule he does so. The right to receive is inferred from the fact of rent being income. There is nothing in the Act which says that the consideration for a surrender under s. 13, sub-s. 1, is to be apportioned; but *In re Rodes* (1) decides that it must. The principle of that decision is that the parties are to get what they would have got if there had been no surrender. If the reversion on a lease is sold the money paid has to be apportioned under s. 34. Under that section the tenant for life is entitled to have what he would have received if there had been no sale. It is submitted that the rent reserved by the new lease in the present case is not "the best rent" that could have been obtained, unless there is taken into account the further consideration represented by the value of the surrendered lease. Sect. 7, sub-s. 2, and s. 13, sub-s. 5, must be read together. The real essence of the transaction here is that the persons who are to enjoy the property for the first nineteen years of the new lease have acquired something at the expense of the persons who are entitled for the succeeding years. The bank are in effect paying 1400*l.* a year rent for the nineteen years of the unexpired term in consideration of their paying less rent for the succeeding eighty years.

[YOUNGER J. Suppose in fact that this lease instead of being for ninety-nine years was for twenty-one years, and that at the time it was granted there was a subsisting lease for seven years and that the same transaction was gone through, and the tenants for life granted a new lease for twenty-one years at a higher rental and claimed the rent for themselves, I suppose it would be said that the increase of rent for the first seven years ought to be capitalized. Suppose the tenants for life to live for twenty-two years, on what principle can you claim the difference as capital?]

The proper way would be to spread the excess rent over the

(1) [1909] 1 Ch. 815.

unexpired term of fourteen years. But where the period is very long a simpler way is to treat what the other party to the bargain is prepared to give as being the measure of the gain to the tenants for life, and the corresponding loss to the remaindermen, and to capitalize the amount. This method is not mathematically accurate; but the same criticism may be made where a fine is capitalized under the Settled Land Act, 1884. It is admitted that it is a stronger thing to capitalize a rent than a fine, which is prima facie capital.

Capitalization would have been the proper method of apportionment under s. 34, if instead of granting a longer lease the tenants for life had sold the reversion: *Cottrell* v. *Cottrell.* (1) That was an alternative course, which the tenants for life might have adopted in this case.

[YOUNGER J. Where do you get the implied power to apportion the rent?]

In re Rodes (2) shows that such a provision can be implied, where the Act is silent.

Cur. adv. vult.

Jan. 21. YOUNGER J. read the following judgment:—This summons, which was argued yesterday, raises a novel and, as I think, a difficult point under s. 13, sub-s. 5, of the Settled Land Act, 1882. [His Lordship stated the facts above set out, and continued:]

The first question that I have to determine is the effect of the saving clause in Sargant J.'s order of July 27, 1914. Does that saving clause merely reserve for future determination the legal question how, on the footing that the lease then approved was properly granted by the tenants for life, the excess rent referred to was to be dealt with? Or is the effect of the saving clause this, that the tenants for life, as a term of getting the Court's sanction, submitted to be bound by any order the Court as a matter of fairness and equity might thereafter think fit to make with reference to the retention or the capitalization or the accumulation of the excess rent or any part of it? It would perhaps be easier to answer this question satisfactorily if one could be quite certain under what section of the Settled Land Act, 1882, the application was made to

(1) (1885) 28 Ch. D. 628. (2) [1909] 1 Ch. 815.

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Sargant J., or what power the Court possessed under that Act to deal with it. For it does not seem that there is any section in the Act at least directly applicable to the case, and I think the real foundation of the order was the general jurisdiction of the Court in the matter of trusts to protect trustees—in this case the tenants for life—by sanctioning, in the presence of the parties interested, an act of administration which they desired to carry out. So regarding the order, I think the saving clause must be taken to mean no more than this, that the question as to the destination of the excess rent was reserved for determination purely as one arising under the Settled Land Act, but upon the footing that the lease sanctioned was in the circumstances a proper lease to be granted under the powers conferred upon the tenants for life by s. 13 of the Act.

Now that section, so far as material, is as follows: Sub-s. 1 provides that "A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof"—the latter part of the sub-section is immaterial in the present case. Sub-s. 5 provides that "On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease"; and sub-s. 6 is, "Every new or other lease shall be in conformity with this Act." Now that last sub-section takes us back to s. 6 of the Act, which provides that "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—(i.) In case of a building lease, ninety-nine years. . . . ." Sect. 7, sub-s. 1, provides that "Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date"; and sub-s. 2, "Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine

taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case." Then s. 8, sub-s. 1, is, "Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with building purposes." The effect of these sections seems to be that while the best rent is to be reserved, nevertheless "the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken"; that is to say, the rent or the fine, if there be one, may be reduced below the best rent or best fine by the amount of the lessee's interest in the unexpired surrendered term. But, further, the lessor is not required to take a fine; s. 13 contemplates that a fine will not always be taken; the tenant for life is empowered by the section to reserve the whole of the consideration, so far as payment is concerned, in the form of rent, and I must take it to be the result of the order of July 27, 1914, that it was proper so to do in this case. The effect, however, of that is this: First, that the rent of 2500*l.* is in every year of the whole ninety-nine years' term less than the best rent by the value of the lessees' interest in the surrendered lease spread over that period, and, secondly, that the present tenants for life will as a result of the transaction, if they are entitled to the whole of the reserved rent, receive for twenty years 1400*l.* in every year more than they were entitled to under the surrendered lease, and, as against that, those entitled to the reversion for the rest of the term will have to submit to receive in each year a rent which is less than the best rent and without compensation of any kind for the deficiency. It is, of course, obvious that this result might have been avoided by a mere re-arrangement of terms, and the question accordingly is whether there is any power in the Court to effect the same result by requiring the excess rent or any part of it to be capitalized or accumulated or dealt with otherwise than by payment to the tenants for life. In other words, are the rights of the tenants for life in a case like the

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present to be determined solely by the form of the lease which is granted, or is it permissible for the Court to adjust the successive interests in the consideration on proper principles irrespective of the form in which it is reserved ?

In support of the view that this power must be inherent in the Court Mr. Topham, for the remaindermen, argued that this new lease was in effect the sale of a partial interest in the reversion, and he pointed to s. 34 of the Act, which empowers the trustees or the Court, where the whole of the reversion is sold, to cause the purchase-money "to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid." And he cited the case of *Cottrell* v. *Cottrell* (1), where Kay J. held under that section that as between tenant for life and remainderman, where lands subject to a beneficial lease are sold under the Settled Land Act, 1882, the tenant for life is, during the unexpired period of the term, entitled to so much only of the income of the invested purchase-moneys as equals the rents under the lease, and that the rest of that income must be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired. Reference was also made to the case of *In re Rodes* (2), where Parker J. held that money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which has been granted by the tenant for life under the powers of the Settled Land Acts, does not belong to him as a casual profit, but must be paid by instalments to him and other persons entitled to the rent.

Now, I feel the force of those considerations, and I would willingly enough give effect to them if I thought it were open to me to do so; but the words of the section are, I think, too strong for me in a case like this, where no objection can be taken to the propriety of the lease as granted. Rent under a building lease seems to me, so far as the Act is concerned, to be within the description of rents and profits and receivable as such, in the absence of any provision in the settlement to the contrary. There is no provision in the

(1) 28 Ch. D. 628. (2) [1909] 1 Ch. 815.

Act for capitalizing rent so called except a part of the rent reserved under a mining lease by virtue of s. 11. I can find no trace anywhere that the rent reserved by a proper building lease under s. 13, sub-s. 5, is to go in any direction different from that reserved by a similar lease under ss. 6 and 8. Further, Kay J.'s decision shows that the rule of the Court in such a case as the present if there be a rule would be not only to capitalize but to accumulate the excess rent during the term of the surrendered lease; but s. 13, sub-s. 5, plainly authorizes a fine to be taken under such circumstances as we have to deal with here. Indeed, a fine might have been taken in this case to represent the excess rent, and, if it had, the tenants for life would have been entitled to the interest upon it when invested under the express provisions of s. 4 of the Act of 1884; that is to say, there would be capitalization but no accumulation. So that by the express provisions of the Act you find excess rent in the form of a fine dealt with on other than the equitable principles laid down by Kay J. Further, in a case of falling values it might well be that under s. 13, sub-s. 5, a less rent would be reserved under the new lease, which would be for a longer term, than was payable under the surrendered lease, and there is certainly no provision in the Act under which that deficiency could be made good to the tenant for life. Not only does the Act contain no indication of intention to reserve to the Court or to trustees any power to divert any rent reserved under a new lease from its normal destination, but the Legislature may well have refrained from conferring that power upon the Court by reason of the difficulty of exercising it properly.

The statutory provision capitalizing a fine in every case is merely a legislative method of cutting a knot; it does not solve the difficulty. The enactment applies to a fine on every lease, however long or however short, but there can be no reason on principle why a fine reserved on the granting of a lease which does not endure beyond the life of the tenant for life who granted it should be capitalized; in such a case he is on principle as much entitled to the fine as he is to the rent reserved during the whole term. And there are few cases—although the present may be one—in which a mere direction to capitalize excess rent would be really just or fair. In most cases some part at least of the rent so capitalized should in

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justice fall to the tenant for life on the principle applied in the case of *In re Baring* (1) or to his successors. Indeed the true principle would be, not after the expiration of the original lease to hold the accumulated fund as capital moneys, but to distribute it by equal payments over the whole term of the new lease amongst the persons for the time being entitled to the rent thereby reserved, who might be a tenant for life just as likely as a remainderman. Further, if Kay J.'s rule is always to be applied to such a case as this, and the excess rent is not only to be accumulated but to be capitalized as well, that would in the majority of cases deprive the tenant for life in possession of all advantage from the transaction and would remove all real incentive to the exercise of a power which it might be greatly to the advantage of the settled estate should not be in abeyance.

On the whole there are, I think, sound reasons for holding that, in every case in which a lease such as that now under review is not open to question on the ground of impropriety or otherwise, the Act intends that it shall be operative in accordance with its tenor. Unless the lease is so improper as to amount to an unlawful exercise of his powers by the tenant for life, it is quite in accord with the spirit of the whole Act that the Legislature intended that the tenant for life should keep to himself everything which under the terms of the instrument he had succeeded in retaining for himself.

Under these circumstances I think the declaration must be that no portion of this rent ought to be retained or capitalized.

Solicitors: *Brighten & Lemon; Burne & Wykes.*

(1) [1893] 1 Ch. 61.

W. I. C.

In re ALBERT ROAD, NORWOOD (Nos. 56 and 58).

PETERSON J.

1915

Nov. 30; *Dec.* 14.

[1915 A. 077.]

Company—Leases to Company—Equitable Mortgage of Demised Premises—Foreclosure—Order directing Assignment—Dissolution of Company before Assignment—Reversion of Term to Lessor—Trustee—Vesting Order—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 25, *sub-s.* 1, *and s.* 26—*Petition—Service on Reversioner.*

In 1912 premises were demised for a term of ninety-nine years to a limited company and its assigns at a yearly rent of 7*l.* 10*s.* The company became dissolved in July, 1915, under the provisions of s. 195 of the Companies (Consolidation) Act, 1908, without having assigned the premises in compliance with a foreclosure order obtained by the equitable mortgagee of the company.

Upon the petition of the mortgagee for (1.) a declaration that the company at the date of its dissolution was a trustee of the premises for him within the meaning of the Trustee Act, 1893, (2.) the appointment of a new trustee, and (3.) a vesting order, the Court, having regard to the decision in *Hastings Corporation* v. *Letton* [1908] 1 K. B. 378 (that a lease to a corporation determines upon the dissolution of the corporation without having assigned the term and the lessor's reversion is accelerated), ordered the petition to be served on the reversioner, and, subsequently, upon his appearing and consenting, made the declaration as asked, appointed a new trustee in the place of the company and the reversioner, and made a consequential vesting order.

Petition.

By two indentures of lease, both dated March 20, 1912, and made between Sydney Robert Jones of the one part and the Municipal Contract and Construction Company, Limited, of the other part, the above-mentioned premises were respectively demised to the company and its assigns for the term of ninety-nine years from December 25, 1911, at the yearly rent for each house of 7*l.* 10*s.* and subject to the covenants on the part of the lessees and conditions therein contained. The leases contained no provision against assignment without the lessor's consent.

By a foreclosure order absolute made on March 18, 1915, in an action to enforce an equitable mortgage created by deposit, the present petitioner was declared entitled to all the estate and interest of the defendants, the Municipal Contract and Construction

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Company, Limited, in the above-mentioned leasehold premises, and the defendants were ordered to convey and assign the same premises to the petitioner and to stand thenceforth absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the same, and to deliver to the petitioner possession of the premises. No conveyance or assignment under the order was ever made to the petitioner.

On February 10, 1914, a resolution for winding up the company was passed and a liquidator appointed. The final meeting of the company was held on April 12, 1915, and the liquidator duly made a return to the Registrar of Companies of the holding of the meeting in pursuance of the provisions of s. 195 of the Companies (Consolidation) Act, 1908. The return was registered on April 21, 1915, and on July 21, 1915, the company became dissolved.

The mortgagee now presented this petition praying for (1.) a declaration that the company was at and immediately before the date of its dissolution possessed of its estate and interest in the leasehold premises as trustee for the petitioner upon a trust within the meaning of the Trustee Act, 1893, (2.) the appointment of a new trustee, and (3.) a vesting order.

C. J. W. Farwell, for the petition. Under the foreclosure order the petitioner is absolutely entitled in equity to these leasehold premises, and it is only because no assignment of them was executed by the company before its dissolution that he is obliged to seek the assistance of the Court.

In *In re General Accident Assurance Corporation* (1) a company, which was mortgagee of leasehold premises by assignment, sold all its property and assets to a purchasing company and by inadvertence omitted to assign the mortgaged premises before its dissolution. Farwell J. was of opinion that the case fell within the purview of the sections of the Trustee Act relating to a trustee who " cannot be found," and made a vesting order. In *In re Taylor's Agreement Trusts* (2) Buckley J. in the case of letters patent did not adopt the view of Farwell J. in the earlier case, but in the later case of *In re Richard Miles & Co. (Brierly Hill)* (3), where the property

(1) [1904] 1 Ch. 147. (2) [1904] 2 Ch. 737.
(3) [1905] W. N. 36.

of the dissolved company consisted of freeholds and copyholds, Farwell J. followed his previous decision.

In the subsequent case of *In re No.* 9, *Bomore Road* (1), where the facts were very similar to those in *In re General Accident Assurance Corporation* (2), Warrington J. appointed a new trustee on the ground that it was expedient to appoint a new trustee within the meaning of s. 25, sub-s. 1, of the Trustee Act, 1893, and made a vesting order.

A difficulty, however, has since arisen by reason of the decision of a Divisional Court in *Hastings Corporation* v. *Letton* (3), where the Court, applying the law as laid down in Blackstone's Commentaries, vol. i. p. 484 (4), held that a lease to a corporation for a term of years determines if the corporation is dissolved without having assigned the term, and that on dissolution of the company the lease does not vest in the Crown as bona vacantia, but the reversion is accelerated and the land reverts to the lessor.

In *In re Ruddington Land* (5), a case where freehold land was vested in a society incorporated under the Industrial and Provident Societies Acts, which had become dissolved before any conveyance of the land was executed, *Hastings Corporation* v. *Letton* (3) was cited, but nevertheless Parker J. appointed a new trustee in place of the society and made a vesting order.

In the recent case of *In re Woking Urban Council (Basingstoke Canal) Act,* 1911 (6), which involved the question of a lease to a corporation which had been dissolved, each member of the Court of Appeal referred with approval to the decision in *Hastings*

(1) [1906] 1 Ch. 359.
(2) [1904] 1 Ch. 147.
(3) [1908] 1 K. B. 378.
(4) The material passage is as follows: "But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation; which *may* endure for ever: but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life."
(5) [1909] 1 Ch. 701.
(6) [1914] 1 Ch. 300.

PETERSON J. 1915 — ALBERT ROAD, NORWOOD (NOS. 56 AND 58), *In re.*

Corporation v. *Letton*. (1) According to the two last mentioned authorities it would seem that in the present case the premises in question reverted to the original lessor.

PETERSON J. I shall direct the petition to stand over in order that it may be served upon the reversioner.

The reversioner was duly served, and the petition, with the appropriate amendments in the prayer, came on for further hearing on December 14.

C. J. W. Farwell, for the petition. In this case the foreclosure order operated as an equitable assignment of the company's interest in the leaseholds, and where the mere legal term is all that remains in the company, the beneficial interest being in the assignee, the lessor, to whom the premises revert upon the dissolution of the company, takes them as trustee for the assignee, and I submit that a Court of Equity will not allow the equitable interest of third parties to be defeated by a merger of the term.

[PETERSON J. Inasmuch as the reversioner takes the premises as trustee, that would prevent the interest which so reverts to him from vesting in him beneficially.]

I ask the Court to say that the term is now in the reversioner as trustee and to appoint a new trustee in the place of the reversioner upon his consenting to retire.

P. B. Morle, for S. R. Jones, the reversioner, consented to the order being made as prayed.

PETERSON J. I shall make a declaration that the company was at and immediately before the date of its dissolution possessed of its estate and interest in the leasehold premises as trustee for the petitioner upon a trust within the meaning of the Trustee Act, 1893, and, the reversioner consenting, appoint, pursuant to s. 25 of the said Act, the person named in the petition a trustee of the estate and interest in the premises in substitution for the company and the reversioner, and order that the estate and interest which the company had immediately prior to its dissolution, and the

(1) [1908] 1 K. B. 378.

estate and interest which became vested in the reversioner upon the dissolution of the company as trustee for the petitioner, do vest in the new trustee upon the trusts upon which the same were held by the company and the reversioner as aforesaid.

PETERSON J.
1915
ALBERT ROAD, NORWOOD (NOS. 56 AND 58), *In re.*

Solicitors: *Burchell, Wilde & Co.; H. Percy Crowe.*

R. M.

In re TIMSON.
SMILES *v.* TIMSON.

[1915 T. 1048.]

YOUNGER J.
1916
Jan. 21, 25, 26.

Will—Construction—Issue—Parent.

Testatrix gave her residuary estate subject to a life interest to five named nephews and nieces, and directed that, if any of them should die in the lifetime of the tenant for life leaving "issue," such issue should take the share which his, her, or their deceased "parent" would have taken if living; but if any of them should die in the lifetime of the tenant for life without leaving "issue" him or her surviving, the share of the one so dying should be divided amongst the survivor or survivors and the "issue" of him, her, or them so dying and leaving issue:—

Held, that the word "issue" in each branch of the clause must be confined to children.

Sibley v. *Perry* (1802) 7 Ves. 522 applied.

Ross v. *Ross* (1855) 20 Beav. 645; *Ralph* v. *Carrick* (1879) 11 Ch. D. 873; and *In re Embury* (1913) 109 L. T. 511 distinguished.

ADJOURNED SUMMONS.

Frances Anna Timson, who died in 1889, by her will, dated April 1, 1858, gave her residuary estate to trustees in trust to pay the income to her nephew, W. W. A. Lukin, during his life, and after his death to his wife, Blanche Lukin, during her life, and after the death of the survivor upon trusts in favour of the children of W. W. A. Lukin as therein mentioned, and in default of children (which happened) bequeathed her residuary estate unto five nephews and nieces by name in equal shares; "and if all or any or either of my said nephews and nieces shall die in the lifetime of my said nephew, W. W. A. Lukin, and Blanche Lukin, or in the lifetime of the survivor of

YOUNGER J. 1916 TIMSON, *In re.* SMILES *v.* TIMSON.

them, leaving lawful issue, then I direct that such issue shall take the share or shares which his her or their deceased parent would have taken if living; but if any or either of my said nephews and nieces shall die in the lifetime of the said W. W. A. Lukin and Blanche Lukin, or in the lifetime of the survivor of them, without leaving lawful issue him or her surviving, then I direct that the share or shares of him or her so dying shall go and be divided amongst the survivor or survivors of my said nephews and nieces and the issue of him her or them so dying and leaving issue as aforesaid."

W. W. A. Lukin survived his wife Blanche, and died without issue in 1914. The five named nephews and nieces of the testatrix were all then dead, having left children and grandchildren amounting to upwards of sixty persons.

This was an originating summons raising (inter alia) the questions whether the expression "lawful issue" in the above clause was restricted to children or whether it included also remoter descendants; and if so, then whether the issue of all degrees took together per capita or whether they took per stirpes; and in either case whether the persons described as "lawful issue" took as joint tenants or as tenants in common.

W. S. Eastwood, for the summons.

E. Beaumont, for children of the nephews and nieces. First, the word "issue" in each branch of the clause must be confined to children. There is no original gift to the issue as such, but they only take their "parent's" share—that is, the share of a nephew or niece—by way of substitution. The present case falls within the rule in *Sibley* v. *Perry* (1) and *Pruen* v. *Osborne* (2), and not within the exception from that rule taken in *Ross* v. *Ross* (3) and *Ralph* v. *Carrick*. (4) [He also referred to Jarman on Wills, 6th ed. pp. 1596, 1597.]

Secondly, if the word "issue" includes remoter descendants, I contend that the division should be per stirpes and not per capita.

E. A. Jennings, for another child, supported the same argument as to the meaning of the word "issue," and referred to the speeches

(1) 7 Ves. 522.
(2) (1840) 11 Sim. 132.
(3) 20 Beav. 645.
(4) 11 Ch. D. 873.

of Lords Cranworth and Chelmsford in *Martin* v. *Holgate* (1) as recognizing the rule in *Sibley* v. *Perry*. (2)

C. Gurdon, for grandchildren of nephews and nieces whose parents being the respective children of such nephews and nieces survived such nephews and nieces respectively. There is no sufficient ground for limiting the word "issue" to mean children in this will. Prima facie the word includes all descendants, and the burthen is on those who assert the contrary. I submit that all descendants are entitled to share and that they take per capita.

J. K. Young, for another grandchild, supported the same argument as to the meaning of the word "issue." A gift to "issue" prima facie includes descendants of every degree—*Davenport* v. *Hanbury* (3)—and the reference to "parent" can properly be read in a sliding sense referring to successive generations: *Ross* v. *Ross*. (4) Great doubt has been thrown on the rule in *Sibley* v. *Perry* (2) by the judgments of the Court of Appeal in *Ralph* v. *Carrick* (5) (per James L.J. (6) and per Brett L.J. (7)), which was a decision on the word "descendants," but James L.J. said that supposing the word "issue" and not "descendants" had been used it seemed to him impossible to distinguish the case from *Ross* v. *Ross* (4) or to say that *Ross* v. *Ross* (4) was not decided upon sound principles. In the same case Brett L.J., referring to *Ross* v. *Ross* (4), says: "It is an authority for holding that where the word 'issue' is used in its more extended meaning in the gift over, that more extended meaning is to be carried back to the former part of the will, though the word is there in collocation with 'parents,' and that the case is thus taken out of the operation of the rule in *Sibley* v. *Perry*." (2) See, too, *Birdsall* v. *York* (8); Jarman on Wills, 6th ed. p. 1594; Hawkins on Wills, 2nd ed. p. 119.

[YOUNGER J. referred to Theobald on Wills, 7th ed. p. 319.]

A. Adams, for grandchildren of nephews and nieces whose parents being the respective children of such nephews and nieces did not survive such nephews and nieces respectively. I support the same

(1) (1866) L. R. 1 H. L. 175, 184, 186.
(2) 7 Ves. 522.
(3) (1796) 3 Ves. 257.
(4) 20 Beav. 645.
(5) 11 Ch. D. 873.
(6) Ibid. 883.
(7) Ibid. 885.
(8) (1859) 5 Jur. (N.S.) 1237.

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argument as to the meaning of the word "issue," and submit that the descendants take per stirpes throughout: *In re Embury.* (1)

F. G. Champernowne, for grandchildren of nephews and nieces born after their respective deaths and before the death of W. W. A. Lukin. The rule in *Sibley* v. *Perry* (2) is not one which cannot be displaced: Jarman on Wills, 6th ed. p. 1598. The word "parent" in this will should be read as "ancestor" or "author of the line of descent."

E. Beaumont referred to the observations on *Birdsall* v. *York* (3) in Jarman on Wills, 6th ed. pp. 1594, 1595.

Jan. 26. YOUNGER J. The question raised by this summons which I have now to deal with involves a consideration of the rule in *Sibley* v. *Perry.* (2) The point has been elaborately argued, and since hearing the arguments I have had the advantage of going through the authorities. The gift in question is contained in the will of Frances Anna Timson, who after giving life interests with a gift in remainder to five named nephews and nieces proceeds as follows: [His Lordship read the first branch of the clause above set out, and continued:] Now that is an original gift to the five named nephews and nieces and to nobody else, and if any of them die leaving issue the issue are to take the share of their deceased parent. So far, therefore, no person described as issue can participate in a share unless it can be predicated of him or her that his or her deceased parent would have taken the share if living. Now, that cannot be predicated of any grandchild of any nephew or niece, but only of a child of such nephew or niece if the word "parent" is to have its ordinary signification. In other words there is no ambiguity in the clause at all unless I am at liberty to attribute to the word "parent" a more elastic meaning than is usual. Now in ordinary parlance the word "parent" may mean either "father or mother," and the comprehensive term was probably used in this will because it was contemplated that some nephews and nieces might be living and some dead. If the words "father or mother" had been used there could be no possible doubt upon the point. Can then the word "parent" be extended

(1) 109 L. T. 511. (2) 7 Ves. 522.
(3) 5 Jur. (N.S.) 1237.

so as to be equivalent to ancestor or author of the line of descent, thus introducing an ambiguity? To adopt such a construction would in my opinion involve an alteration and not an interpretation of the language of the will. So far, therefore, as this branch of the clause is concerned, I do not require to have recourse to the rule in *Sibley* v. *Perry* (1) or to any other authority in order to arrive at the conclusion that issue here means children. But I am the more inclined so to hold because it appears to me, though the point has not been fully argued, that if, in this clause, issue includes descendants more remote than children, the result would be that issue, however remote, would be entitled to take equally in competition with relatives of the testatrix not further removed than grandnephews and grandnieces, and I am not aware of any case in which there has been any reluctance to apply the rule in *Sibley* v. *Perry* (1) where the result of not applying it would be to bring about a non-stirpital division under which remoter issue would take in competition with ancestors. Under such circumstances I am under no temptation to ignore the rule in *Sibley* v. *Perry* (1) to bring about such a result. In my opinion, therefore, both on principle and authority the true construction of the first branch of the clause in question is entirely free from doubt.

I now turn to the second branch. [His Lordship read it, and continued:] If I am right in coming to the conclusion that the word "issue" in the first branch of the clause is free from ambiguity, can I place upon the word "issue" in the second branch any other interpretation than that which it necessarily bears in the first branch? In my opinion, as a mere matter of interpretation I am not at liberty to attach to it any different meaning. The words which introduce each branch are almost exactly identical, and it is I think clear that the draftsman of these two branches was providing for two events, so that if the first event did not happen the second event must happen and there could be no middle course—that is to say, the nephew or niece must die either leaving issue or not leaving issue. In my opinion, therefore, as a matter both of interpretation and of good sense the word "issue" in the second branch of the clause must bear the same meaning as in the first and be confined to children and not be extended to more remote descendants. As a

(1) 7 Ves. 522.

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further consequence of this construction the gift over which I have read must take effect if any nephew or niece die without leaving any living child whether he or she leave remoter descendants or not.

I may say that this construction seems to me to be in accordance with the whole tenor of the testatrix's will. I cannot find anything to show that she took cognizance of any relation beyond a grandnephew or grandniece. All persons beyond that degree are in my view altogether outside the scheme of her bounty.

It has been argued, however, that I am not at liberty to place this construction upon the will for two reasons: first, because it is said that the rule in *Sibley* v. *Perry* (1) is under suspicion and ought not to be followed unless the Court is compelled to follow it; and, secondly, because the decision of Sir John Romilly in *Ross* v. *Ross* (2), followed by Sargant J. in *In re Embury* (3), ought to lead me to a contrary conclusion. As to the first objection it appears to me that the rule of construction adopted in the case of *Sibley* v. *Perry* (1) is, in a case like the present and for the reason I have given, a sound rule. As to the second objection the two cases referred to are in my opinion clearly distinguishable. In each of them not only was there an original gift to the persons corresponding to the nephews and nieces in the present will, but there was an original gift to their issue as well, and it was that original gift to their issue—an ambiguous word—which was seized on by Sir John Romilly in *Ross* v. *Ross* (2) as the basis of his decision; but there is no room for such ambiguity where, as in the present case, there is no original gift to the issue at all. In other words, in the will which was before the Court in *Ross* v. *Ross* (2) there was an original gift to living issue of a deceased child, so that the word "parent" was or might be referable to a child of a deceased child who might have taken a share by reason of the original gift. That that was the ground of Sir John Romilly's decision is plainly shown by the following passage in his judgment where he says (4): "I am disposed to concur in the view that, if the matter had stood there, the case of *Harrington* v. *Lawrence* (5) would have been applicable,

(1) 7 Ves. 522.
(2) 20 Beav. 645.
(3) 109 L. T. 511.
(4) 20 Beav. 650, 651.
(5) (1814) Unreported, but referred to 11 Sim. 138.

and that the word 'parent' must be referred to the child or children of Christian Ross, and yet it is obvious it might bear this construction: it might mean the child of the parent who would have been entitled, if that parent had survived Christian Ross, that is to say, if one of the children had died leaving a child who had died leaving other children"; and then he goes on: "I have pointed out, that, in my opinion, in the clause of the bequest there is an ambiguity about it, because the two members of the clause are not exactly consistent with each other"—in other words, having found an ambiguity in the original bequest, with a gift over which was in meaning unambiguous, the latter meaning prevailed. So in *In re Embury* (1) Sargant J. puts it in the same way, namely, that the basis of the decision in *Ross* v. *Ross* (2) was the ambiguity in the original gift, and that this is the true view of *Ross* v. *Ross* (2) is confirmed by the statement in Hawkins on Wills, 2nd ed. pp. 118, 119, and by the remarks of Hall V.-C. in *Ralph* v. *Carrick*. (3) I was pressed, however, with the decision of the Court of Appeal who in that case reversed Hall V.-C. But when carefully examined that decision does not really affect the view which I have taken of *Ross* v. *Ross*. (2) It was a decision on the word "descendants," and Cotton L.J., who seems to me to have had the real nature of the decision in *Ross* v. *Ross* (2) rather more directly present to his mind than the other members of the Court, says this (4): "I think it is a sound principle that when there are ambiguous words in the original gift you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words contained in the previous gift so as to agree with the unambiguous words contained in the gift over." Turning to the observations of James L.J. and Brett L.J., though they do not say it in so many terms, it is clear that they did not intend to go beyond Sir John Romilly's decision in *Ross* v. *Ross* (2), and I have no doubt that they did not intend to indicate that *Ross* v. *Ross* (2) would apply to a case where there was no ambiguity about the original gift, a view in which I am confirmed by the fact that after the decision of the House of Lords in *Martin* v. *Holgate* (5) it was not

(1) 109 L. T. 511.
(2) 20 Beav. 645.
(3) (1877) 5 Ch. D. 984; reversed on appeal 11 Ch. D. 873.
(4) 11 Ch. D. 888.
(5) L. R. 1 H. L. 175.

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open to the Court of Appeal to disagree in principle with *Sibley* v. *Perry*. (1)

In the absence, therefore, of any ambiguity in the original gift I hold that, according to the true construction of the testatrix's will, the only persons entitled to take under the word "issue" are children of the testatrix's nephews and nieces, and that the gift over took effect on the death of any nephew or niece leaving no child.

E. Beaumont. The children take as joint tenants?

YOUNGER J. Yes.

Solicitors: *Wigan, Champernowne & Co.; Landon & Co.*

A. C.

NEVILLE J. 1916 *Feb.* 11.

WEBSTER *v.* BAKEWELL RURAL DISTRICT COUNCIL.

[1916 W. 16.]

Landlord and Tenant—Trespass by Local Authority—Writ for Injunction by Tenant—Landlord's Request to Tenant to withdraw Writ—Threat to determine Tenancy—Contempt of Court.

The yearly tenant of a cottage and land, adjoining a highway and forming part of a settled estate, issued a writ against the local authority for an injunction to restrain an alleged trespass on his land. The solicitor of the tenant for life of the estate wrote to the local authority with a view to arrange the matter, and at the same time wrote to the tenant that the tenant for life required him to withdraw the writ, and that, if he did not comply, his tenancy would be determined. On motion by the tenant to commit the solicitor for contempt of Court for sending him letters calculated to deter him from prosecuting the action and to prevent the administration of justice:—

Held, that the solicitor had not committed a contempt of Court.

MOTION.

The plaintiff was the yearly tenant of a cottage and land at the rent of 4*l.* 10*s.* per annum. His premises adjoined a highway in the district of the defendants, and formed part of an estate of which a Mrs. Thornhill was the tenant for life. On January 5, 1916, he

(1) 7 Ves. 522.

served the defendants with a writ for an injunction to restrain them from removing soil from his roadside fence or bank and damaging his boundary wall, and on January 7 his solicitors, Messrs. Chapman-Walker & Shephard, wrote to the defendants with a view to an arrangement to avoid further litigation.

In the first week of January, 1916, the defendants' alleged acts of trespass came to the knowledge of Mr. Taylor, the solicitor and estate agent of Mrs. Thornhill, and he wrote to the defendants with a view to settle the dispute. On or about January 10 he heard of the plaintiff's action and at once wrote to him as follows: "Mrs. Thornhill wishes you to withdraw the writ you have issued in the action, and in future if you wish to remain her tenant you must do nothing of the kind again without first consulting her agent on the subject. Please call upon me as soon as possible to discuss the question." The plaintiff did not call on Mr. Taylor, but replied to him by letter, and on January 13 Mr. Taylor wrote to the plaintiff enclosing a document which he requested him to sign and return. The document was in form a notice to his solicitors, Messrs. Chapman-Walker & Shephard, to discontinue the action.

The plaintiff did not return the document, and on January 17 Mr. Taylor wrote to him as follows: "Am I to understand from your letter received this morning that you have decided not to withdraw the writ in this case and to act contrary to Mrs. Thornhill's express wishes? Please inform me on this point as Mrs. Thornhill is anxious to know the course you are taking. If you decide to withdraw the writ please return the document I sent you on Thursday duly signed. I will see that you are not troubled any further and will deal direct with Messrs. Chapman-Walker & Shephard. Mrs. Thornhill is determined that this action shall not go forward and she is anxious to stop it with as little inconvenience to anybody as possible. She does not wish to take the extreme course of turning you out of the cottage so as to place you in such a position that you would have no locus standi in the matter, but she will not hesitate to do so if her wishes are not carried out. I hope however that you will not drive her to take this course."

The plaintiff now moved to commit Mr. Taylor to prison for a contempt of Court in sending him certain letters containing threats calculated to deter him from prosecuting the action and containing

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intimidating matter with a view to interfere with the exercise by him of his legal rights and to prevent the due administration of justice. The defendants in no way instigated the correspondence between Mr. Taylor and the plaintiff.

Jenkins, K.C., and *Whitmore L. Richards*, for the plaintiff. Anything that tends to prejudice the fair trial of an action is a contempt of Court. The principle is that nothing should be said or done to interfere with the due administration of justice: *Welby* v. *Still*. (1) A litigant is entitled to approach the Court free from all restraint or intimidation, and it is a clear contempt of Court for any person, whether a party to an action or not, by a threat to endeavour to prevent a party from prosecuting his suit: *Smith* v. *Lakeman* (2); *Ex parte Chetwynd*. (3) A letter need not be offensive. Mr. Taylor's letter of January 17 is a distinct threat to turn the plaintiff out of his cottage if he does not drop the action, and it is an aggravation that he did not write to the plaintiff's solicitors although he knew who they were.

Ward Coldridge, K.C., and *J. M. Stone*, for Mr. Taylor, were not called upon.

NEVILLE J. In my judgment the jurisdiction which the Court exercises by way of punishment for contempt of Court, where any attempt is made to suborn or interfere with the administration of justice, is a jurisdiction of extreme importance and should be steadfastly upheld. At the same time, as it may involve the liberty of the subject, the jurisdiction should be exercised with great care.

The facts in the present case are shortly these. The plaintiff has brought an action against a local authority for trespass to certain property of which he is a yearly tenant. His tenancy is held under a lady (Mrs. Thornhill) whose agent has committed what is alleged to be a contempt of Court. The action was with regard to the dealings of the local authority with a certain bank and as to the effect of those dealings upon a wall which stood upon the bank, and it was a matter which interested both the plaintiff and the lady as tenant and owner of the property respectively. The plaintiff

(1) (1892) 66 L. T. 523. (2) (1856) 2 Jur. (N.S.) 1202.
(3) (1864) 10 Jur. (N.S.) 1188.

brought his action at a time when negotiations were proceeding between Mrs. Thornhill and the local authority upon the subject of what they had done, and matters seemed likely to come to a satisfactory arrangement between the two. Thereupon Mrs. Thornhill through her agent writes to the plaintiff and says that if he chooses to go on with the action, which she considers will be injurious to her rights as owner of the cottage, she will not hesitate to enforce her legal rights by, as she calls it, turning him out of the cottage. I think that really means after such notice as may be necessary to determine the yearly tenancy. The question is, is that a contempt of Court? I think it is only this: "I do not intend to interfere with the way you carry on the action at all, but it is injurious to me and, if you do carry it on and assert what you allege to be your legal rights in that way, I on my part shall give effect to the legal rights I possess and resume possession of my cottage." I must say I cannot think that can be considered a contempt of Court. The object of turning him out of the cottage would be to deprive him of legal standing to maintain his action and to resume possession of the property in respect of which he is suing. Test it in this way. Some of the tenants on the estate are yearly tenants and some are weekly tenants. Suppose the plaintiff had been a weekly tenant and the lady had said to him, "It is against my interests that this action should proceed against the local authority in respect of this particular property. You are a weekly tenant. If you persist in this action I will determine your tenancy, and then the action will necessarily fail for want of any estate upon which you can maintain it." A weekly tenancy could be determined before any action in respect of the property could be tried, and I cannot see that there is anything to prevent a landlord exercising his legal rights in that way, if he does it honestly to protect the rights he has in the property.

Again, suppose two neighbouring owners have for some time committed trespass on one another's lands, either by allowing water to run or in some similar way, and this in a neighbourly spirit has been allowed to go on, then one brings his action against his neighbour in respect of the trespass he has committed. The neighbour says, "We have allowed this to go on in a friendly way, and if you sue me in respect of my trespass I will sue you on your

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trespass"—obviously done to prevent the prosecution of the action by the litigious neighbour. Could that be said to be contempt of Court? I think not. I cannot see any distinction in principle between that and saying "I will assert my legal rights against you if you choose to go on with your action, which to my mind is detrimental to my interest in the property."

I am of opinion, therefore, that the motion fails and must be dismissed with costs.

Solicitors: *Chapman-Walker & Shephard; G. F. Hudson, Matthews & Co.*

H. L. F.

SARGANT J. 1915 Dec. 10.

In re MAEDER'S TRADE MARK APPLICATION.

[1915 M. 2317.]

Trade Mark—Application for Registration—Similarity to Mark registered by another Proprietor—"Calculated to deceive"—"Honest concurrent user"—Jurisdiction and Discretion of the Court—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19, 21.

In s. 19 of the Trade Marks Act, 1905,—which provides that "except by order of the Court," or in the case of certain old marks, "no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive"—the first six words refer to orders of the Court made under s. 21 of the Act. That section provides that "in cases of honest concurrent user or of other special circumstances which, in the opinion of the Court, make it proper to do so, the Court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor," subject, if thought right, to any conditions or limitations; and the words "calculated to deceive" in s. 19 have a milder meaning than the same words have in s. 11, and the words "so nearly resembling such a trade mark as to be calculated to deceive" mean "so nearly identical as to be confusing." Sect. 19 therefore recognizes that the Court may order registration of a mark where it is either identical with a mark already registered or so nearly identical with the latter as to be confusing. The same two classes of cases are aimed at by s. 21, in which the words "the same trade

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mark" correspond with the word "identical" in s. 19, and the words "nearly identical trade marks" correspond with the words "so nearly resembling such a trade mark as to be calculated to deceive" in s. 19.

B. & Sons had on the register a trade mark in respect of butter and cheese (which mark they had never used for condensed milk), when M., who was an importer of condensed milk, applied for registration of a somewhat similar mark (each containing a representation of a cowslip) in respect of condensed skimmed milk. M. had for twenty-five years sold condensed milk under the name "Cowslip Brand," and the names "Cowslip Brand Condensed Milk" and "Cowslip Condensed Milk" had during that period distinguished his goods. B. & Sons did not oppose the application:—

Held, (1.) that the registrar had rightly refused the application; but (2.) that under ss. 19 and 21 the Court in its discretion could, and that it ought to, order the registration of M.'s mark to be proceeded with.

JOSEPH EMIL MAEDER, a condensed milk importer, on May 11, 1915, applied for the registration of a trade mark (No. 367,393) in class 42 in respect of condensed skimmed milk, the mark, as used, consisting of a coloured pictorial representation of a cowslip, with the words "The 'Cowslip' Brand" printed in ornamental capitals below, the word cowslip being in inverted commas, as above.

In a statutory declaration made by Maeder in support of his application he stated that he had carried on business in London for twenty-six years past, that in 1891 he began to deal in condensed milk under the name "Cowslip Brand," and that the names "Cowslip Brand Condensed Milk" and "Cowslip Condensed Milk" had ever since distinguished his goods.

The registrar refused the application on the ground that a very similar mark was already registered for butter and cheese in the name of T. L. Boyd & Sons, Limited, provision merchants. That mark had until lately been registered in respect of bacon, hams, pork, butter, cheese, and other articles of food, but T. L. Boyd & Sons, Limited, had applied to have all these goods struck out except butter and cheese, and had never used their mark for condensed milk. No opposition was made by them to Maeder's application.

Maeder on October 7, 1915, gave notice of motion by way of appeal against the registrar's decision, asking for an order directing him to proceed with the registration of the mark, or, in the alternative, that in the exercise of the original jurisdiction of the Court, under

SARGANT J. s. 21 of the Trade Marks Act, 1905, registration of the mark might be permitted.

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There was evidence by affidavits of Maeder and certain condensed milk manufacturers and merchants, and provision brokers and a provision merchant, to the effect that "Cowslip Brand" condensed milk had been for many years known in the trade and recognized as Maeder's goods, and that none of the deponents had ever heard of anybody else's condensed milk being sold under the name of "Cowslip."

L. B. Sebastian, for the applicant. The applicant's first point is that the registrar was wrong in not ordering the application to be proceeded with; and his second point is that, even if the decision was right, the Court has jurisdiction under s. 21 of the Trade Marks Act, 1905, to order registration. When the application was made to the registrar the applicant's attention was for the first time called to the other mark, but that had been registered in respect of butter and cheese, whereas the applicant seeks registration in respect of condensed milk only. The manufacture of condensed milk has always been in very few hands, and is mostly carried on separately from the manufacture of butter and cheese, so that there is very slight possibility of confusion. The applicant has communicated with Boyd & Sons in order to give them an opportunity of being heard; but they have not opposed, and the only objection is a technical one by the registrar. As regards the first point, the marks are not the same, and a butter mark is quite unsuitable for use on a tin of condensed milk. Moreover, the goods are different, even though they are in the same class. Condensed skimmed milk has only come into use in comparatively modern times; most of it is of Dutch production. As to long user, seven or ten years is considered considerable; here there is twenty-five years' user, and there is no evidence of any complaints. Boyd & Sons have raised no objections, and it would be quixotic for the applicant to give up all the benefits of his mark simply because of this technical objection. *In re F. Braby & Co.'s Applications* (1) does not apply, because Boyd & Sons' mark has never been used for condensed milk. *In re Australian Wine Importers* (2) is dis-

(1) (1882) 21 Ch. D. 223. (2) (1889) 41 Ch. D. 278.

tinguishable, because it was an opposition case, and there had been no user until shortly before the application was made, and there was then no enactment in force corresponding with s. 21 of the Trade Marks Act, 1905. [He also referred to *In re König & Ebhardt's Trade Mark* (1), *In re Gutta Percha and India Rubber Co. of Toronto's Applications* (2), and *In re Carborundum Co.'s Application*. (3)] Even if the registrar's discretion is excluded, s. 21 enables the Court to do justice on the merits of the case.

Austen-Cartmell, for the Comptroller-General as Registrar of Trade Marks (called on only as to the second part of the motion). There may be cases within s. 19 of the Trade Marks Act, 1905, which are not within s. 21 ; but all cases within s. 21 must be within s. 19. The Court may, but is not bound to, permit registration. In a case like this the Court will be guided by the circumstances which guide the registrar, or the Court on appeal from him, in the exercise of their discretion.

[SARGANT J. Then nobody can get any benefit by honest concurrent user.]

The case is not put so high as that. What is meant is that the Court may, under s. 19, order the registration of identical trade marks. If a mark is on the register, and application is made to register another one, either the same or so like it that, if used together with it in the same market side by side, deception would be likely, the registrar cannot register the second mark, or consider other circumstances which may prevent prejudice to the public. Sects. 19 and 21 have together this effect. It must be assumed that the registrar was right in holding that butter, cheese, and condensed milk were the same description of goods, but he cannot go into considerations apart from those which arise on putting the two marks side by side ; he cannot go into the question of user. The Court cannot go into questions which are not open to the registrar. To bring in s. 21 the Court assumes that the registrar is ousted under s. 19. And what ousts the registrar is the puzzle in considering the two sections.

[SARGANT J. The Court can take into consideration honest concurrent user.]

(1) (1896) 13 Rep. Pat. Cas. 449. (2) [1909] 2 Ch. 10.
(3) (1909) 26 Rep. Pat. Cas. 504.

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That is admitted, but the real point is whether there is any likelihood of the public being deceived. Public as well as private rights must be protected. *In re Verity's Trade Mark* (1) was the kind of case which s. 21 was intended to meet, and the same considerations do not apply here. The applicant's goods are not limited to the London market, but go to York, Bristol, and Hull. Condensed milk, butter, and cheese, as the registrar found, are all sold in the same shop. Customers of either party, going into a shop and seeing goods marked with either brand, would suppose that they were the goods of one producer. That test was suggested in *In re Gutta Percha and India Rubber Co. of Toronto's Applications*. (2)

[SARGANT J. Under the old law there was no discretion either in the registrar or the Court. I must give some effect to the enabling section, s. 21.]

The best way to test s. 21 is to take it that the marks are identical. Under the old law registration could not be permitted. A remedial section is intended to relax something that was an absolute prohibition, but in relaxing the prohibition the Act uses the word "may" and gives the Court a discretion, in exercising which the Court must be guided by the considerations which guided it in considering cases where there was no prohibition. Sect. 21 does not say in terms that the Court has discretion to allow the registration of the second mark if it comes to the conclusion that it is calculated to deceive.

[SARGANT J. referred to *In re Ehrmann's Applications*. (3)]

Sect. 20 only amounts to this, that where there are concurrent applications the registrar may refuse to register either until the rights of the parties have been determined by the Court.

[SARGANT J. Was not s. 20 put in to remedy the hardship of *In re Ehrmann's Applications* ? (3)]

Sect. 20 is not an enabling section at all ; it is s. 71 of the old Act.

[SARGANT J. Assuming I am against you on the second point, can you suggest any conditions which might be imposed on the applicant ?]

It is very difficult to suggest any conditions. It comes back to

(1) (1901) 19 Rep. Pat. Cas. 58. (2) [1909] 2 Ch. 10.
(3) [1897] 2 Ch. 495.

the question whether the marks can be so used as to be distinctive of the particular goods they represent. Apart from the Act of 1905, the application could not succeed. The case is no doubt within the Court's discretion under s. 21, but then the question arises on what principles that discretion should be exercised. The Court must look at the interests of the public and see whether the goods are likely to be sold in the same shops and would be confused by the public, not by experts such as those who have given evidence: *Eno* v. *Dunn* (1); *In re Australian Wine Importers.* (2) In these circumstances it is submitted that the Court's discretion should not be exercised in favour of the applicant.

SARGANT J. This is an application of a double character. It is in the first place an appeal from the decision of the Registrar of Trade Marks refusing registration of a certain mark, and in the second place it is of the nature of an original application to the Court for the purpose of getting the Court to exercise the discretion given to it by s. 21 of the Trade Marks Act, 1905.

The proposed mark is one containing a representation of a cowslip and the words "Cowslip Brand," and registration of it is sought in respect of condensed milk. The difficulty has been created by there being already on the register a mark with the word "cowslip" in it, and containing certain mystic marks which appear to me to represent a cowslip as viewed from one extremity. This first registration was effected in 1880 or 1881, and was in respect of bacon, hams, pork, butter, cheese, and other provisions and articles used as food. The owners of that mark, T. L. Boyd & Sons, Limited, have, however, consented to a limitation of the goods in respect of which that trade mark is to be used so as to reduce them to butter and cheese, and the registrar rightly dealt with the present application, and I propose to deal with it, on the footing that that registration has been so reduced. No objection to that course has been taken.

The registrar, in the exercise of his discretion and with the intimate acquaintance which he has with applications of this kind, has come to the conclusion that, apart from the discretionary power given to the Court under s. 21 of the Act, which of course he has no

(1) (1890) 15 App. Cas. 252. (2) 41 Ch. D. 278.

SARGANT J. power himself to exercise, and treating the application as an ordinary one, there was sufficient risk of deception, or rather confusion, on the part of the public, for him to decline to register the mark applied for; and, in spite of all I have heard from Mr. Sebastian on the point, I think that the registrar exercised his discretion rightly, and that, if I had had to deal with the application originally and not from the point of view of whether I ought or ought not to overrule his discretion, I might very probably have come to the same conclusion. That being so, it seems to me that, so far as the present motion seeks to override the discretion of the registrar, I ought to refuse it.

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Then comes the second part of the motion, namely, the application that the original jurisdiction of the Court may be exercised. With regard to that, I think it is necessary to look rather closely at ss. 19 and 21 of the Act. By s. 19 the proper authority is forbidden (subject to certain exceptions) to register a mark " which is identical with one belonging to a different proprietor which is already on the register, ... or so nearly resembling such a trade mark as to be calculated to deceive." I think that phrase means so nearly identical as to be confusing, and I do not think that the phrase " calculated to deceive " in that section has quite the same meaning as " calculated to deceive " in s. 11. I think the expression is used in s. 19 in a milder sense. Then it will be observed that s. 19 seems in terms to recognize that an order of the Court may be made in a case where the trade mark to be registered is either identical or so nearly identical with one already on the register as to be confusing. I agree with the view which I see is expressed in Mr. Kerly's book on Trade Marks, 4th ed. p. 256, and which occurred to me independently, that the words " except by order of the Court " refer to orders made by the Court under s. 21, and I think they also refer to orders made under s. 20.

The language of s. 21 is not exactly the same as that of s. 19; but I think that the same two classes of case are aimed at and that in s. 21 the expression " the same trade mark " corresponds with the word " identical " in s. 19, and that the expression " nearly identical trade marks " corresponds with the expression in s. 19, " so nearly resembling such a trade mark as to be calculated to deceive." Then what is the effect of s. 21 ? It seems to me that it gets rid of the prima facie disability imposed on the registering authority by

s. 19, and enables trade marks which are either identical with existing trade marks, or are nearly identical with existing marks, to be registered in the case either of honest concurrent user or other special circumstances; that is to say, it relaxes the strict rule which had otherwise bound the registering authority under the previous legislation in a certain limited class of cases. It seems to me that the intention was to allow the Court to weigh against a slight possibility of deception or a slight possibility of confusion in the minds of the public, the commercial claims which a proprietor of a common law trade mark might have acquired through a considerable amount of concurrent user.

The present case seems to me on the facts to be a particularly strong one, because this trade mark, as a common law trade mark, has been in use for something like twenty-five years—since the year 1891. Its use has been in respect of goods which, although they are often, I will not say universally, sold in the same shops as butter and cheese, still differ to a very considerable extent from those articles; for whereas butter and cheese are, as a rule, sold divested of any covering, and in what may be considered their natural state, condensed milk is sold universally in tins and hidden from the eyes of the public, and really seems to me to be of a very different character from ordinary natural articles such as butter and cheese. It is, as a rule, in this country an article which is produced by a very much smaller number of manufacturers than either butter or cheese, and, according to my experience, is mainly produced by foreign manufacturers. Further than that, I have the fact that T. L. Boyd & Sons in no way object to the proposed registration, and though I quite recognize that an agreement between the proprietors of two trade marks is not by any means conclusive in a case of this kind, yet it seems to me to be a circumstance that is deserving of very attentive consideration. Moreover, during the whole twenty-five years during which the products of the applicant have been sold in this country, so far as is known, there has been no case of deception, and I think I can take into consideration on that point not only the evidence that was given by the applicant himself, but also the circumstance that T. L. Boyd & Sons, the proprietors of the competing trade mark, or what might have been considered the rival trade mark apart

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from their attitude, are ready to consent to this registration. If there had been during the twenty-five years any considerable confusion between the two marks, it seems that it must have certainly come to the knowledge of T. L. Boyd & Sons, Limited, and it would have prevented them giving the consent which they are now prepared to give.

Accordingly it seems to me that the case is eminently one in which the Court may, by virtue of the exception in s. 19 and the affirmative provisions of s. 21, allow registration because of the honest concurrent user which has taken place, although it would not be allowed if the applicant were coming here apart from that honest concurrent user.

Therefore I direct, under the discretion which is vested in me, and which, as I have said before, the registrar had not the power to exercise, that the registration do proceed.

Of course the registrar must have his costs of the motion.

The order will be that "The Court, being of opinion that there has been a sufficient honest concurrent user to bring the matter within section 21, orders that the registrar do proceed with the application."

[The costs of the registrar were ordered to be paid by the applicant.]

Solicitors: *Neve, Beck & Kirby; Solicitor to the Board of Trade.*

F. E.

RAINBOW *v.* KITTOE.

SARGANT J.

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Jan. 31 ; *Feb.* 2.

[1915 R. 1311.]

Practice — Costs — Security — Plaintiff suing as Administrator — Administrator as Agent for Person out of the Jurisdiction.

A plaintiff who is an administrator, even although the letters of administration are only granted to him as the attorney of a person who is abroad and until that person obtains letters of administration, and although he is shown to be insolvent, will not be ordered to give security for the defendant's costs of the action.

Observations on *Greener* v. *E. Kahn & Co.* [1906] 2 K. B. 374, and *White* v. *Butt* [1909] 1 K. B. 50.

THIS was an application by the defendant, by summons, asking that the plaintiff might be ordered to give security for the costs of the action. The plaintiff in August, 1915, had obtained in England letters of administration with the will annexed of one Esther Pitt (who died in 1851), the grant being made to him as the attorney of John W. Cook (who was in Australia) for Cook's own use and benefit and until Cook should apply for and obtain letters of administration of the estate of one Esther M. Cook. Similar letters of administration had been granted to the plaintiff in respect of the estate of Esther M. Cook.

J. W. Cook was the only surviving child of Esther M. Cook. Esther Pitt left her estate to four persons, jointly, and the survivor of them was Esther M. Cook. On Esther Pitt's death possession of her estate had been obtained, and the present action was brought against persons who took under one of the alleged tortfeasors by way of following the estate.

In order that Cook should succeed in the action it was necessary, while he was out of the jurisdiction, that some one should take out administration as his attorney, and the learned judge found that in selecting the plaintiff there had been no deliberate intention on his part or that of his solicitor to select a person who could not pay the costs in case of failure ; that it was difficult to find a first-class person as plaintiff in the action ; that Rainbow, the plaintiff, was as eligible a person as could under the circumstances be selected ; and that, although not a man of straw, he would probably not be able to pay the costs if the action failed.

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Maugham, *K.C.*, and *Cyril Hartree*, for the defendant. Cook, being out of the jurisdiction, would, if he had brought the action, have been ordered to give security for costs. Rainbow was willing to be Cook's attorney and as such to take out letters of administration, first of the estate of Esther Mary Cook, as one of Esther Pitt's next of kin, and then of Esther Pitt with the will of the latter annexed. Clothed with the mantle of administrator cum testamento annexo, but only as Cook's attorney, he comes forward as the plaintiff in this action. He is a mere nominee and can and ought to be ordered to give security for costs. It is true that if a plaintiff is clothed with a mantle of a final and permanent character, he is not ordered to give security, however insolvent he may be, but the case is different when he is a mere attorney and a stranger to the case, whose right to sue ends when his principal dies or chooses to obtain administration himself.

A plaintiff who is suing for his own benefit, however insolvent he may be, is not required to give security so long as his case is in a Court of first instance, although when he appeals security may be ordered. An exception to the general rule is that, where the plaintiff is a mere nominee and is without means, security for costs is ordered. Exceptions to that exception are where the plaintiff, although insolvent, is suing as an executor: *Sykes* v. *Sykes* (1); a trustee in bankruptcy: *Cowell* v. *Taylor* (2); or as a liquidator in the winding up of a company: *In re Strand Wood Co.* (3) In none of these cases is security required, for in each case the plaintiff is clothed with a permanent official mantle, which is something very different from the precarious official clothing of the present plaintiff.

In some cases the Probate Division grants administration limited to the bringing of an action, and, assuming a bond with sureties is in such cases required, that is no help to the unfortunate although successful defendant. The flimsy character of the mantle with which such a plaintiff as Rainbow is clothed and the ease with which it is obtained and may be removed are shown in Tristram and Coote's Probate Practice, 13th ed. pp. 121, 122, 151, 172. The peculiar position of an administrator of this kind is shown by *Webb* v. *Kirby* (4), where the grant was durante absentia of the testator's

(1) (1869) L. R. 4 C. P. 645.
(2) (1885) 31 Ch. D. 34.
(3) [1904] 2 Ch. 1.
(4) (1856) 7 D. M. & G. 376.

next of kin, and it was held that the grant came to an end with the principal's death.

The exceptions in favour of not ordering security are not to be lightly extended: *Greener* v. *E. Kahn & Co.* (1) There the plaintiff, who was suing as the trustee of a deed of assignment of the property of another person for the benefit of the latter's creditors, was ordered to give security.

[SARGANT J. There the trustee was selected by the assigning debtor, but here the Probate Division in its discretion has clothed the plaintiff with an official capacity.]

In such cases as this the Probate Division makes no inquiry as to the solvency of the proposed grantee of letters of administration—a crossing-sweeper would not be ineligible—and that is enough to distinguish the case from those in which the Court does not require security from representative plaintiffs. An ordinary administrator might be rather within the principle of *Cowell* v. *Taylor* (2) than that of *Greener* v. *E. Kahn & Co.* (1), but there is no reported decision as to whether an ordinary administrator must give security for costs. Under a limited grant like this the administrator has no sort of duty to perform to any one but the real plaintiff, Cook. In the exceptional cases in which security is not required the plaintiff has a real and tangible official position, and not a merely nominal one as here. Besides being a mere nominee, the plaintiff is insolvent.

[SARGANT J. "Insolvent," in this connection, means in such poor circumstances that, if unsuccessful, he probably could not pay the costs.]

Jessel, *K.C.*, and *Boome*, for the plaintiff. The Court has no jurisdiction to order the plaintiff in this case to give security for costs. Rainbow was not selected as plaintiff purposely to avoid responsibility for costs. The course adopted here was the course which is invariably adopted when a person entitled to take out administration is resident abroad. Here Rainbow may be a "nominal plaintiff" in one sense, but he is not such a "fictitious plaintiff" as he must be in order that security for costs can be required of him: *White* v. *Butt.* (3) There the Court of Appeal held that trustees of a separation deed, appointed in the place of the

(1) [1906] 2 K. B. 374, 378. (2) 31 Ch. D. 34.
(3) [1909] 1 K. B. 50.

SARGANT J. original trustees, were not mere nominal plaintiffs in an action for arrears of an annuity under the deed, and that an order on them to give security for costs could not be made. Here, as in that case, the plaintiff is the only person who can sue while Cook is abroad. *Greener* v. *E. Kahn & Co.* (1) was discussed in *White* v. *Butt.* (2)

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[SARGANT J. Unless in the former case it was supposed that the debtor had deliberately selected a trustee who was insolvent, the two decisions seem to be rather in conflict. Vaughan Williams J. seems to have thought, in *Greener* v. *E. Kahn & Co.* (1), that there had been such a selection.]

Both *Greener* v. *E. Kahn & Co.* (1) and *Sykes* v. *Sykes* (3) are cases of private trustees, but this case stands on a higher ground, and is analogous to the case of an executor, a trustee in bankruptcy, or a liquidator. The plaintiff is clothed by the Probate Division with an official capacity, and is bound, like any other administrator, to collect the assets and distribute them according to law. In the performance of those duties his representative character enables him to give a good title even if his letters of administration are subsequently recalled: *Hewson* v. *Shelley.* (4) The fact that the plaintiff is the attorney of another person makes no difference. He is appointed by the judicial act of the Probate Division, and every other division and person must pay deference to that.

[SARGANT J. If the administrator-plaintiff were out of the jurisdiction security for costs would be ordered.]

No doubt; but that would be on another ground. The judgment of Phillimore L.J. in *Hewson* v. *Shelley* (5) deals with the cases of limited grants, and shows that the grantee is administrator for all purposes. Administration with the will annexed, granted to the attorney of an executor who was abroad, was held not to be revoked by the mere appearance of the principal in this country: *In the Goods of Cassidy.* (6) There the Court gave directions as to the form of future grants durante absentia, and that is the origin of the present form. Where letters of administration have been granted to one person as attorney for another the former is not the mere agent of the latter, but can be sued as if he had obtained letters of administration

(1) [1906] 2 K. B. 374.
(2) [1909] 1 K. B. 50.
(3) L. R. 4 C. P. 645.
(4) [1914] 2 Ch. 13.
(5) [1914] 2 Ch. 43, 44.
(6) (1832) 4 Hagg. Ecc. 360.

in his own right: *Chambers* v. *Bicknell*. (1) Even the nominee of the Crown who takes out letters of administration is under the same obligations as any other administrator: *Attorney-General* v. *Köhler*. (2) The same case shows that the administrator, although claiming only as the attorney of another, is fully competent to deal with the whole estate coming to his hands and is bound duly to administer; and in that case *Chambers* v. *Bicknell* (1) was approved. (3) The attorney in such a case is responsible for the due administration of the assets, and the principal cannot give him a good discharge: *In re Rendell* (4); *In re Dewell*. (5) [He also referred to *Suwerkrop* v. *Day* (6) and to *Denston* v. *Ashton* (7), the case of an assignee in bankruptcy.]

Maugham, K.C., in reply.

SARGANT J. This is a difficult case, and one which is very near the line, and my opinion has varied during the argument.

The application is by the defendant that the plaintiff may be ordered to give security for costs, on the ground that he is without means and is a mere nominee, for the purpose of bringing the action, of one John William Cook.

The plaintiff is, in fact, the grantee of letters of administration with the will annexed of one Esther Pitt, deceased, during the absence of J. W. Cook, and as his attorney. [His Lordship read the grant and continued:]

The matter in question goes back a very long way, and the action, which at first strikes one as being of a somewhat speculative nature, is founded on this: Esther Pitt, who died in 1851, left the residue of her estate to four persons jointly, of whom the survivor was the mother of J. W. Cook, and it is alleged that certain persons, with knowledge of the dispositions made by the will, became possessed of a certain sum in Consols and disposed of it contrary to the provisions of the will. It is sought in the action to render the persons who took part of the estate of one of these alleged tortfeasors liable by way of following the assets. Whether the claim will succeed or fail is a question with which I have nothing to do at present.

(1) (1843) 2 Hare, 536.
(2) (1861) 9 H. L. C. 654.
(3) 9 H. L. C. 688.
(4) [1901] 1 Ch. 230.
(5) (1858) 4 Drew. 269.
(6) (1838) 8 Ad. & E. 624.
(7) (1869) L. R. 4 Q. B. 590.

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The person called the real plaintiff—J. W. Cook—is out of the jurisdiction in some part of Australia, and, for the purpose of enforcing any right in respect of the estate of Esther Pitt, it was necessary that letters of administration with her will annexed should be granted to some one or other. There has been some discussion as to whether J. W. Cook himself could have obtained such a grant; but this, at any rate, is common ground between the parties, that in the usual course of business letters of administration would be applied for by some one on his behalf. J. W. Cook seems to be rather an illiterate person and in a humble position in life. He was approached by a solicitor, who is now acting in these proceedings, and was asked to execute a power of attorney under which the present plaintiff should become entitled to take out letters of administration with the will of Esther Pitt annexed, and thereby be able to constitute the action in its present form. I do not find any deliberate intention on the part of the solicitor, or of the plaintiff acting through him, to select a person who would be unable to pay costs. There are certain elements in the case which do not commend themselves to me. I do not like the arrangement under which the solicitor is to get one-third of the proceeds, or that under which Mr. Rainbow, the plaintiff, is to get 25 guineas in case of success; but I cannot help thinking that it would be no easy matter, however bona fide and properly a solicitor might be acting, to find a first-class, solvent, respectable person to take out letters of administration as attorney for a person in the position of J. W. Cook and to prosecute this action. Therefore, although I cannot say that Rainbow is a perfectly eligible plaintiff for the purpose, he seems to be about as eligible a person as could in the ordinary course of business be obtained. That being so, and having regard to the absence of deliberate intention to which I have referred, and also to the probability, on the evidence, that should the plaintiff be unsuccessful he will be unable to pay the defendant's costs, I have to consider whether he ought to be ordered to give security for costs.

Now the first rule of our Courts clearly is that no plaintiff should, on the mere ground of poverty, be deprived of his opportunity of suing in a Court of first instance; the matter is otherwise when the question of appeal comes to be considered. But to that rule there is this very broad and general exception, that where a person is

suing as a mere nominee of the real plaintiff—and I will consider presently what is meant by the phrase " a mere nominee "—and he is also insolvent, that is to say unable to pay the costs if given against him, he should be ordered to give security for costs. The broad general reason for that exception is that a plaintiff is not to be allowed to escape from liability for costs by means of setting up a dummy to fight on his behalf.

But then again there is an exception to the exception I have mentioned, which I may state in this way: Where a plaintiff who is obnoxious as being a nominee and insolvent happens to be suing in a representative capacity, so that he is not simply and solely a nominee of the person whom I call the real plaintiff, security for costs cannot be ordered. What the expression " a mere nominee " means in this connection seems to me to be open to some little doubt; and in that respect I am not quite sure that the two recent cases in the Court of Appeal of *Greener* v. *E. Kahn & Co.* (1) and *White* v. *Butt* (2) are reconcilable—at any rate with regard to some of the expressions in those cases. Certainly in *Greener* v. *E. Kahn & Co.* (1), in which security for costs was ordered, the person who sued was the trustee of a deed of assignment in trust for the creditors of the assignor, and therefore, though he had been selected by the person whom I will call the real plaintiff, he was suing in a representative character: while in *White* v. *Butt* (2), in which it was held that security for costs could not be ordered, the persons suing were the trustees of a separation deed who had been appointed in the place of the original trustees of the deed, and there again were suing in a representative capacity. I think those two cases cannot be thoroughly reconciled except on the assumption, which seems to underlie the judgment of Vaughan Williams L.J. in *White* v. *Butt* (2), that the person selected in *Greener* v. *E. Kahn & Co.* (1) as trustee of the creditors' deed had been deliberately selected for the very purpose of depriving the defendants, whom he was going to sue, of their power to get costs should they prove successful. Buckley L.J. certainly took that view, because in his judgment he speaks of the term " nominal plaintiff " as being the equivalent of the expression " fictitious plaintiff." There is this, at any rate, in favour of that view, that the typical case which is selected—not only in the two

(1) [1906] 2 K. B. 374. (2) [1909] 1 K. B. 50.

SARGANT J. cases to which I have referred, but in other cases—for considering the exception to the general rule as to not ordering security, is the case where an intending plaintiff has deliberately denuded himself of the subject-matter of the action in order that he may get his dummy, the assignee, to bring the action on his behalf.

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With reference to the rule as to how far persons suing in a representative capacity are required to give security for costs, I may refer, in the first place, to *Cowell* v. *Taylor* (1), in which it was held that a plaintiff who was suing as the trustee in bankruptcy, although insolvent, was not liable to give security for costs; to *In re Strand Wood Co.* (2), where the same ruling was applied to the case of a liquidator in the winding up of a company; and to the cases which apply the same rule to the case of an ordinary executor suing in that capacity. As regards the reported decisions which have been cited to me, I cannot find that it has ever been held that a plaintiff who is suing in a representative capacity, properly so called (with the possible exception of the trustee of the creditors' deed in *Greener* v. *E. Kahn & Co.* (3)), or who has been duly clothed with a representative capacity, should be ordered to give security for costs.

What is the position of Mr. Rainbow, the plaintiff in this action? It is true that he has been selected by J. W. Cook, through the solicitor now acting for him; but, notwithstanding that selection, he has been clothed with a definite representative capacity by the Probate Division of this Court, in accordance with its statutory powers. Although described as the attorney of J. W. Cook in the grant of administration, the plaintiff, as can be shown by many decided cases, is not simply Cook's principal, but is bound to perform the duties of administrator to every person who is interested in the estate which he has undertaken to administer.

It has been said here that the Probate Division makes no inquiries as regards the solvency of a person who is appointed, as the attorney of another person who is abroad, to take out letters of administration for that person. Without professing to be familiar with the practice of that Division, I may say that, should it be found that such a grant, if made without inquiry and as a matter of course, results

(1) 31 Ch. D. 34. (2) [1904] 2 Ch. 1.
(3) [1906] 2 K. B. 374.

in persons being put in a position to bring actions under unduly harsh conditions towards defendants, the practice of that Division can be modified. For the present, however, it is sufficient to say that a Court of competent jurisdiction has clothed Mr. Rainbow, the plaintiff, with the definite office of administrator with the will annexed of Esther Pitt.

I am not disregarding the argument of Mr. Maugham, which impressed me very much, as to its being inconceivable that the plaintiff, Rainbow, should have any duties to perform except towards J. W. Cook, because it is evident that all debts of the testatrix must have been paid long ago, and that there is really no one—except, possibly, Government authorities claiming duties—who is interested in the estate except J. W. Cook. Nevertheless, when I take into account (1.) that Rainbow has been selected as plaintiff in the ordinary course of business, and not for the mere purpose of depriving the defendants, if successful, of their costs, and (2.) that Rainbow is a person clothed by a Court of competent jurisdiction with a representative capacity, I am of opinion that, if I were to order the plaintiff to give security for costs, I should be going very considerably beyond any case which has hitherto been decided, and should in particular be giving a decision which would be in conflict with the decision of the Court of Appeal in *White* v. *Butt.* (1)

Accordingly, though with much hesitation, I refuse the application, and I order that the plaintiff's costs of this application be costs in the action.

Solicitor for defendant: *William P. Neal.*
Solicitors for plaintiff: *Champion & Henderson.*

(1) [1909] 1 K. B. 50.

F. E.

SARGANT J.

1916

Feb. 15.

In re STAPLES.

OWEN *v.* OWEN.

[1915 S. 3121.]

Practice—Originating Summons—Decision of Questions as to Rights in Future—Rules of the Supreme Court, 1883, *Order* XXV., *r.* 5 ; *Order* LIV.A.

Notwithstanding Order XXV., r. 5, and Order LIV.A of the Rules of the Supreme Court, 1883, the rule laid down by Jessel M.R. in *Curtis* v. *Sheffield* (1882) 21 Ch. D. 1—that it is the practice of the Court not to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decision, or there are other special circumstances to satisfy the Court that it is desirable at once to decide on the future rights, or all the parties who in any event will be entitled to the property are of age and are ready to argue the case—is generally applicable at the present time.

By a will freehold property was devised to M. for life " and after her death to her children and their issue, per stirpes and not per capita, in equal shares as tenants in common." There was a similar devise to T. for life and after his death to his children and their issue. M. had five children, all of whom had attained twenty-one. T. had two sons (both over twenty-one), and the sons had between them three infant children. An originating summons by two of M.'s children and T.'s two sons against M., T., and the infant grandchildren, raising the questions whether under the devises in remainder the children of M. and T. respectively who were or might be entitled to share in the properties were entitled for estates in tail as tenants in common, and, if not, what class or classes of persons would, on the death of M. and T. respectively, be entitled :—

Held, that the Court ought not, in its discretion, to decide the questions raised while the interests of the children and issue were still in remainder, but that the summons must stand over, with liberty to amend, as it was intimated that the children might desire an opportunity of executing disentailing assurances and applying to obtain payment of the proceeds of sale of part of the property which had been sold.

THOMAS STAPLES, by his will dated October 10, 1882, gave to his wife all property which he might die possessed of or entitled to for her life. Later on he gave five freehold houses in Wrexham Street, Beaumaris, to his daughter, Mary Ann Owen, for her life, " and after her death to her children and their issue, per stirpes and not per

capita, in equal shares as tenants in common," and three other houses in the same street to his son, Thomas Staples, for his life, "and after his death to his children, per stirpes and not per capita, in equal shares as tenants in common." The testator died in November, 1882, and his widow died in 1884. Mary Ann Owen had five children, the youngest of whom was born in 1872. Thomas Staples, the son, had two children (born in 1882 and 1884 respectively), one of whom had a son (born in 1915), and the other two sons (born in 1909 and 1914 respectively). An originating summons was taken out by two of Mary Ann Owen's children and the two children of Thomas Staples (the son) against Mary Ann Owen, Thomas Staples, and the three infant grandchildren for the determination of the question whether, under the devise of the houses, in remainder after the death of the testator's widow and Mary Ann Owen, in favour of her children and issue, her children who were or might be entitled to share in the devised premises were respectively so entitled for estates in tail as tenants in common in equal shares, and, if not, what class or classes of persons were or would, on Mary Ann Owen's death, be entitled to the devised property, and for what estates and interests. A similar question was asked as to the children and issue of Thomas Staples.

J. M. Gover, for the plaintiffs. The Court is asked in this case to decide the rights of persons in the future. In many cases it is not advisable that questions as to rights in the future should be decided, but it is submitted that this is not one of those cases. The fact that no immediate relief is claimed is immaterial, for Order XXV., r. 5, of the Rules of the Supreme Court, 1883, provides that "no action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." The validity of this rule has been established by *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), in which it was also decided that the Court could make declarations at a plaintiff's instance although at the time he had no cause of action, and that whether a declaration ought or ought not to be made in such a case was a matter in the

(1) [1915] 2 K. B. 536.

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Court's discretion. Chitty J. had previously so held, as to the discretion of the Court, in *In re Berens.* (1) The rule was made to obviate the difficulty caused by its having been decided that Order LV., r. 3, of the Rules of the Supreme Court, 1883, gave no jurisdiction to the Court, upon an originating summons, to decide a question arising between legal beneficial devisees under a will.

[SARGANT J. It was so held in *In re Davies* (2), which was approved by the Court of Appeal in *In re Royle.* (3)]

The effect of Order XXV., r. 5, is also discussed by Lord Davey in *Barraclough* v. *Brown.* (4) By Order LIV.A, r. 1, "any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested"; and the scope of that rule is only limited by the discretion of the Court provided by r. 4 of the same Order—which provides that "the Court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons"—and the rule is not confined to cases where an action might be brought: *Nicholls* v. *Nicholls* (5); *Mason* v. *Schuppisser.* (6) An example of a case where the procedure by originating summons was held to be improper—a very different case from this—is afforded by *Lewis* v. *Green.* (7)

Even if the case is not within the precise terms of the Rules of the Supreme Court—and it is often difficult to say whether those Rules modify or simply declare the practice of the Court—it is well within the old practice rule laid down by Jessel M.R. in *Curtis* v. *Sheffield* (8), for there are here "special circumstances to satisfy the Court that it is desirable at once to decide on the future rights." There are questions as to alleged breaches of trust, which make it desirable that the Court should say out of what funds the moneys said to have been misapplied should be replaced. Moreover, some of the property has been sold, and the purchase-money is in hand

(1) [1888] W. N. 95.
(2) (1888) 38 Ch. D. 210.
(3) (1889) 43 Ch. D. 18.
(4) [1897] A. C. 615, 623.
(5) (1899) 81 L. T. 811.
(6) (1899) 81 L. T. 147.
(7) [1905] 2 Ch. 340.
(8) 21 Ch. D. 1, 4.

and might, perhaps, be distributed if the hands to receive it could be ascertained. If the children of Mary Ann Owen and Thomas Staples, on the footing that they were tenants in tail, executed proper disentailing assurances, the Court would not hesitate to decide whether they were or were not tenants in tail: *Lady Cardigan* v. *Curzon Howe*. (1) On applications under s. 5 of the Conveyancing Act, 1881, the Court will decide questions of construction involving the future interests of unborn children: *In re Freme's Contract* (2); although, of course, where the purchase-money can be followed, regard will be had to the interests of incumbrancers from whose securities the property has been freed: *In re Wilberforce's Trusts*. (3) [He also referred to *Honour* v. *Equitable Life Assurance Society of the United States* (4), and, as to parties, to Rules of the Supreme Court, 1883, Order XVI., rr. 9, 32.]

Bethell, *Wilfrid M. Hunt*, and *Beebee*, for the various defendants, also expressed their desire that the summons might be heard.

SARGANT J. I am much indebted to Mr. Gover for his able argument in this case.

The first question raised by the summons is whether under a devise in the testator's will of certain freehold houses, in remainder after the death of the testator's widow and his daughter, Mary Ann Owen, in favour of that daughter's "children and their issue per stirpes and not per capita in equal shares as tenants in common," the children of Mary Ann Owen who are or may be entitled to share in the property are so entitled for estates in tail as tenants in common in equal shares, and, if not, what class or classes of persons are or will on Mary Ann Owen's death be entitled and for what estates or interests. A similar question is raised on a devise of other freehold houses, subject to the life interest of the testator's son, Thomas Staples, to his children and their issue.

I am asked to decide those questions now, while the interests of the children and issue are still in remainder, and in my judgment I ought not to do so.

The general rule of practice as to making declarations with reference to future rights was laid down by Jessel M.R. in *Curtis* v.

(1) [1901] 2 Ch. 479.
(2) [1895] 2 Ch. 256.
(3) [1915] 1 Ch. 94.
(4) [1900] 1 Ch. 852.

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Sheffield (1) on an application for leave to appeal from an order made by Shadwell V.-C. forty-five years before the application for leave to appeal; and that rule is, in my judgment, generally applicable at the present time. He says: "It is true that it is not the practice of the Court, and was not the practice of the Court of Chancery, to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decisions, or there are some other special circumstances to satisfy the Court that it is desirable at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs, and it becomes a mere technicality. The reason of the rule is this, that the Court will not decide on future rights, because until the event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties who, when the event happens, may be entitled to succeed; but where they are all of age, and every possible party is represented before the Court, as I said before, utility seems to say that there should be a power to determine their rights, as is the case in Scotland and in many other countries." In 1883 Order xxv., r. 5, was made, and it provides that "no action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." The validity of that rule was established by the decision of the Court of Appeal in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2), where it was also held that the Court could make a declaration at the plaintiff's instance, although at the time he had no cause of action, and, apparently, that it was a matter in the discretion of the Court whether a declaration ought or ought not to be made in such a case.

I do not wish to express any doubt as to the jurisdiction of the Court to make a declaration as to future rights when all the parties are not present; that also seems to be a matter of discretion rather than of jurisdiction; but the observations of Jessel M.R. in *Curtis* v. *Sheffield* (1) show that such a declaration should not,

(1) 21 Ch. D. 1, 3. (2) [1915] 2 K. B. 536.

as a rule, be made where all the parties interested are not ascertained. Nevertheless there are, undoubtedly, some cases in which the Court must give decisions affecting the rights of persons who are not parties to the proceedings. For instance, under the Vendor and Purchaser Acts decisions are frequently given on the construction of wills, by which persons not parties are indirectly affected. So, also, in cases under s. 5 of the Conveyancing Act, 1881, when the Court directs provisions to be made for incumbrances on land and the sale of the land freed therefrom, the Court will, if necessary, decide questions of construction involving the determination of interests in futuro, although the rights in future of unborn children are affected : *In re Freme's Contract.* (1)

Do the circumstances of the present case lead me to the conclusion that I ought now to decide the questions as to the future rights of the children and issue of Mary Ann Owen and Thomas Staples ? I do not think so. There are some questions as to alleged breaches of trust which may make it desirable that I should say out of what funds the moneys said to have been misapplied should be replaced, but on that point the summons can be amended so that that question may be decided without the necessity of making a declaration on the main questions. Apart from that, the only special circumstance is that some of the property has been sold, and the purchase-money, under the provisions of the Settled Land Acts, is still in hand, but that in my judgment constitutes no greater reason for deciding who will be entitled to those moneys than for deciding who would be entitled to the land itself.

It may be that, if as suggested by counsel the children of Mary Ann Owen and Thomas Staples execute disentailing assurances, with the consent of the protector of the settlement, and come here with the tenants for life claiming to be entitled to the purchase-moneys, as in *Lady Cardigan* v. *Curzon Howe* (2), I may be forced to deal with the questions of construction involved.

I may add that Order LIV.A only deals with procedure, and does not enlarge the jurisdiction as defined in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (3)

The summons must stand over generally, with liberty to add

(1) [1895] 2 Ch. 256, 778. (2) [1901] 2 Ch. 479.
(3) [1915] 2 K. B. 536.

SARGANT J. parties and amend generally and to restore it for hearing on application.

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STAPLES, *In re.* OWEN *v.* OWEN.

Solicitors for all parties: *Jaques & Co., for W. Thornton Jones, Bangor.*

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C. A.

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NEVILLE J.

Nov. 15, 16.

C. A.

1916

Feb. 10.

CARNELL *v.* HARRISON.

[1914 C. 2377.]

Infant—Marriage Settlement—Repudiation after Eighteen Years—Reasonable Time—Reversionary Property—Repudiation before the Reversionary Property came into Possession—Infant's Ignorance of Right to repudiate.

The "reasonable time" within which an infant must exercise her right to repudiate a settlement of reversionary property made by her on her marriage must be calculated from the time when she attains twenty-one, and not from the time when the reversionary property falls into possession and becomes payable to her or her trustees.

An infant cannot plead ignorance of her right to repudiate as an answer to her obligation to exercise that right within a reasonable time.

Decision of Neville J. affirmed.

In re Jones [1893] 2 Ch. 461 disapproved.

Carter v. *Silber* [1892] 2 Ch. 278 and *Edwards* v. *Carter* (same case in the House of Lords) [1893] A. C. 360 applied.

ON December 20, 1895, the plaintiff, Emily Maria Harrison, an infant of the age of twenty years, and her intended husband executed a settlement whereby they agreed to assign to trustees upon the trusts of the settlement certain reversionary interests in freeholds to which the infant would on her marriage become entitled in remainder expectant upon the death of her mother.

The trusts of the settlement were for the plaintiff for life for her separate use without power of anticipation, with the usual subsequent trusts in favour of the children of the marriage in such shares, if more than one, upon such conditions and in such manner as she should appoint, and in default of appointment for all the children of the marriage who being sons should attain the age of twenty-one

years or being daughters should attain that age or marry under that age, with an ultimate remainder in trust for the plaintiff absolutely. The intended husband took no interest under the settlement. The marriage was solemnized the day after the execution of the settlement. There were three children of the marriage — two daughters, born on September 24, 1896, and December 2, 1908, respectively, and one son, born on February 5, 1902.

On September 10, 1914, the plaintiff commenced this action claiming a right to repudiate the settlement. At that date the interests settled were still reversionary, the plaintiff's mother being still alive. The children of the marriage were all living, but had not acquired any vested interest under the settlement.

There was evidence that the plaintiff had no knowledge that she ever had a right to repudiate the settlement until shortly before the issue of the writ. Then a solicitor whom she consulted on other matters advised her that she had a right to repudiate it. Up to the time of the issue of the writ she had done nothing either to confirm or repudiate the settlement. She had lived apart from her husband for some years, her infant children being left in the charge of her mother, and maintained herself by her own exertions.

The action came on for hearing before Neville J. on November 15, 1915.

Gilbart-Smith, for the plaintiff. In *In re Jones* (1) North J. held that it is not an unreasonable time for an infant to repudiate a settlement if she elects to do so "when for the first time the question arises whether anything is or is not to be received by her or her trustees under it." On that ground he allowed an infant to repudiate a settlement of reversionary property nearly thirty years after its date, when the settled property first came into possession. This is a stronger case, for the settled property is still reversionary, and no one except the plaintiff has acquired a vested interest under the settlement. In the case before North J. the settlor's children had attained vested interests.

In *Carter* v. *Silber* (2), affirmed by the House of Lords under the name of *Edwards* v. *Carter* (3), it was held that an infant could not

(1) [1893] 2 Ch. 461, 469. (2) [1892] 2 Ch. 278.
(3) [1893] A. C. 360.

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under the special circumstances repudiate a settlement after the lapse of four years, but the length of time had nothing to do with the decision. Lindley L.J. said in his judgment (1): "What is a reasonable time? That, I agree, depends upon all the circumstances of each particular case." The special circumstances in that case were that the plaintiff's father, who had contributed largely to the settled funds and also left the plaintiff considerable property by will, had died in the interval and could not rearrange the distribution of his property, as he probably would have done if the plaintiff had repudiated the settlement in his lifetime.

The decision of the present Master of the Rolls (Lord Cozens-Hardy) in *Viditz* v. *O'Hagan* (2) shows that in the case of reversionary property a long time may be reasonable. The plaintiff has never done anything to confirm the settlement, and was wholly ignorant, until very shortly before the writ was issued, that she had any right to repudiate the settlement.

W. J. Whittaker, for the defendants. It is a point to be considered in this case that there are infant children of the plaintiff approaching the age of twenty-one years, at which they would take vested interests, who have been maintained and brought up by the plaintiff's mother on the assumption that they would have these interests. The repudiation of the settlement would affect their position. That makes the period of eighteen or nineteen years which the plaintiff has waited before repudiation quite unreasonable. The decision of North J. in *In re Jones* (3) depended on the special facts of the case. If he intended to lay down a rule that if the settled property is reversionary an infant settlor is entitled, in any case, to wait until the property comes into possession before deciding whether he will repudiate or not, the decision is contrary to the judgments of the Court of Appeal in *Carter* v. *Silber* (4) and of Lord Herschell in the same case in the House of Lords. (5) The judgments of the Lords Justices in the same case are against the proposition that an infant's ignorance of his right to repudiate a settlement will excuse him from the obligation to repudiate it within a reasonable time. This question was not argued before the

(1) [1892] 2 Ch. 285.
(2) [1899] 2 Ch. 569.
(3) [1893] 2 Ch. 461.
(4) [1892] 2 Ch. 278.
(5) *Edwards* v. *Carter* [1893] A. C. 360, 363.

House of Lords, so they must be taken to have affirmed the Court of Appeal on the point.

Gilbart-Smith in reply.

NEVILLE J. The question I have to consider in this case is whether or not the plaintiff has the right to repudiate a settlement executed by her before attaining twenty-one at the expiration of a considerable number of years, a number of years which, taken without explanation, would, I think, necessarily be considered an unreasonable time within which the right to repudiate could be exercised. There are two points here which require attention as qualifying the inference to be drawn from the length of time which has elapsed after attaining twenty-one : one is that the property comprised in the settlement was wholly reversionary and has not yet fallen into possession ; the other is that the evidence shows that the plaintiff was unaware of any right to repudiate until a short time before the commencement of the action.

With regard to the question of the reversionary character of the property there is a decision of North J. in *In re Jones* (1), in which, in coming to the conclusion as he did there that under all the circumstances of the case the right to repudiate was still in existence, he suggested that in the case of a reversionary interest the time at which the obligation to exercise the right commences is not the attainment of twenty-one by the settlor, but upon the falling into possession of the property. Now the learned judge expressly declares that he is deciding the case before him simply on the question of fact, and that under all the circumstances of the case he concluded that there a reasonable time had not expired before the exercise of the right to repudiate. It appears to me that that statement puts it out of my power to follow the learned judge's decision. It is the duty of the Court to decide questions of fact for itself, and in my opinion it is falling short of its obligations if it finds the facts in the case before it in a particular way because some other judge in another case, where the facts were similar, came to a certain conclusion, and consequently I cannot deal with that as an authority which I can follow. I cannot but think that the proposition of North J., that in his opinion the right

(1) [1893] 2 Ch. 461.

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to repudiate does not require to be exercised before the falling into possession of the settled property, is at variance with the decision in the House of Lords in the case of *Edwards* v. *Carter* (1), and with the decision of the Court of Appeal, which was confirmed by the House of Lords, in the same case under the name of *Carter* v. *Silber*. (2) In that case in the Court of Appeal the learned judges, I think one and all, with more or less force emphasized and laid down certain propositions. Those propositions do not seem to me to be affected by the question of whether the property was in possession or whether it was in reversion. If it is the obligation of an infant to repudiate the document executed during infancy within a reasonable time after attaining twenty-one, it seems to me that obligation is the same whether the property is in possession or in reversion. Having regard to the character of the obligation imposed on the infant if he wishes to escape from the consequences of the deed he has executed, it appears to me that the character of the property is not very material. I do not say it is wholly immaterial, but it is not so material as to shift the date of the obligation to exercise the power of repudiation from the attainment of twenty-one to the date when the property falls into possession. In dealing with *Carter* v. *Silber* (3) in the Court of Appeal and the House of Lords, I have also to consider how far the matter is affected by the evidence before me, that the plaintiff was unacquainted with her rights until a short time before the commencement of the action. That point was raised before the Court of Appeal, and, an adverse decision having been come to there, the contention appears to have been dropped when the case came before the House of Lords, and I think I must treat the House of Lords as having, in substance at all events, confirmed the view of the Court of Appeal with regard to the immateriality of the knowledge of the right possessed by the settlor. I take, in the first instance, the judgment of Bowen L.J., because Lindley L.J. is not so explicit in the matter as the other judges of the Court. Bowen L.J. says (4): "It is the law of England that he cannot pray in aid his ignorance of the right of an infant to repudiate after he comes of age; and being fixed constructively with knowledge of what was in the settlement, the

(1) [1893] A. C. 360.
(2) [1892] 2 Ch. 278.
(3) [1892] 2 Ch. 278; [1893] A. C. 360.
(4) [1892] 2 Ch. 286.

law will not allow him to benefit by his ignorance of his right to repudiate. Therefore, I can see no reason for giving him the benefit of the time during which his father was living. He ought at once "— "at once" obviously means on attaining twenty-one—"to have begun to consider when he came of age what his position was, and it was essential that he should do so." Then the Lord Justice proceeds to deal with the facts of the particular case. There is a perfectly clear statement that it is the law of England that he cannot pray in aid his ignorance of the right to repudiate after he comes of age. Kay L.J. is even more wide in his proposition of law. He says (1): "I agree with the statement, that the time within which that right of repudiation must be exercised must be a reasonable time after the infant attains twenty-one, and that the time begins to run from the moment that he attains twenty-one. I asked during the argument, and asked in vain, for any authority for this proposition, which was really the main ground of the argument before us, that in computing that reasonable time there ought to be taken into consideration the question whether the infant was aware of his right to repudiate. The right to repudiate is one which is given by law, and everybody must be taken to know the law, and this is precisely an instance, to my mind, in which that rule is entirely applicable." Now, in my ignorance I should have supposed that there was neither authority nor principle in favour of the statement of law expressed by those two learned judges, but my ignorance is corrected, as it must be, by a statement of a superior Court, the Court of Appeal, about a matter which I think was pertinent, and indeed essential, to the decision of the case before them. If my unaided judgment were uncontradicted I should have come to a wrong conclusion, because I should have thought that up to that time the principle of universal knowledge of the law had in closely analogous cases been shown to be inapplicable to civil matters, and matters in which the act of the person must be determined by his knowledge or ignorance. *Stone* v. *Godfrey* (2) is a case in which the question was whether in equity a person who had mistaken the law could be relieved from the effect of his mistake. That was considered in the case of *Allcard* v. *Walker* (3), where

(1) [1892] 2 Ch. 288. (2) (1854) 5 D. M. & G. 76.
(3) [1896] 2 Ch. 369, 381.

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Stirling J. said: "I think, in the first place, that the mistake was one which related to the existing rights and interests under the settlement within the meaning of the law as laid down by Lord Westbury in *Cooper* v. *Phibbs* (1), where he says: 'It is said "Ignorantia juris haud excusat," but in that maxim the word "jus" is used in the sense of denoting general law, the ordinary law of the country. But when the word "jus" is used in the sense of denoting a private right that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.' In the next place, I observe that it is not accurate to say that relief can never be given in respect of a mistake of law. It was laid down by Turner L.J. in *Stone* v. *Godfrey* (2) that this Court has power to relieve against mistakes of law as well as against mistakes in fact, and this statement was recognised in the judgments of the members of the Court of Appeal in *Rogers* v. *Ingham* (3), and particularly by Mellish L.J., who refers to it and explains it thus: 'That is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.' No doubt the jurisdiction is one to be carefully exercised, and the facts in each case must be closely scrutinised to see which way the equity lies." As I say, if I had not been guided by authority I should have thought that all that was said there with regard to contracts between individuals applied with at least equal force to the case of repudiation by an infant of a contract which he is entitled to repudiate on attaining twenty-one, but it seems that view must be wrong. What appears to be a true analogy is not a true analogy at all having regard to the question of repudiation of a contract made during infancy, although the infant may be in fact ignorant of what the deed contains, as indeed he may well be. In nine cases out of ten contracts of this kind are obtained from the infant upon representations of the parents, and the infant is the last person in the world likely to pay the least attention to what he

(1) (1867) L. R. 2 H. L. 149, 170. (2) 5 D. M. & G. 76.
(3) (1876) 3 Ch. D. 351, 357.

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is asked to put his name to. But it is perfectly clear that that will not excuse him, and I think it is equally clear, having regard to *Carter* v. *Silber* (1), that the fact that he never knew that the right to repudiate existed does not exonerate him from the obligation to consider his position when he attains twenty-one, and within a reasonable time from that date, if he desires to do so, to repudiate the contract. It may be said that in the majority of cases—cases of marriage settlements, at all events—the general advantage is on the side of upholding the contract, both in the interests of the settlor, particularly if she is a woman, and in the interests of the family. It may be therefore upon that ground, though not expressed, that what appears to be an exception has been grafted upon the rule with regard to repudiation by infants of their contracts. But, whether that be so or not, I am not free to come to any conclusion upon my own judgment, but am bound by the case of *Carter* v. *Silber*. (1) Under the circumstances of this case, the plaintiff not being entitled to rely upon the ignorance of her right which I think she proved, I must come to the conclusion that she has come at the expiration of this long period of years too late and that her action must fail.

J. R. B.

C. A.

The plaintiff appealed. The appeal was heard on February 10, 1916.

Gilbart-Smith, for the appellant. The appellant is entitled to repudiate her settlement notwithstanding the lapse of time: *In re Jones*. (2) The question is whether she has repudiated within a reasonable time. Her interest in the property is even now reversionary: *Viditz* v. *O'Hagan*. (3) In that case Cozens-Hardy J. followed *Edwards* v. *Carter* (4), but in commenting on *Cooper* v. *Cooper* (5) said (6) "it may well have been held that it was time enough for her to repudiate when her husband had died, for, had she predeceased him, there would have been nothing to repudiate."

Reasonable time for repudiation is not necessarily a short time.

(1) [1892] 2 Ch. 278; [1893] A. C. 360.
(2) [1893] 2 Ch. 461.
(3) [1899] 2 Ch. 569.
(4) [1893] A. C. 360.
(5) (1888) 13 App. Cas. 88.
(6) [1899] 2 Ch. 576.

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In the case of reversionary property it may well be a long time. What is a reasonable time depends upon the circumstances of the particular case. Where an infant settles her own property and no other interests are affected, why should she not repudiate? The children of the marriage in this case have no present vested interest. The lady has a power of appointment. This case is distinguishable from *Edwards* v. *Carter* (1), because here no rights of others will be altered or prejudiced by repudiation. Moreover, there the settlor received 1500*l.* a year for three years from the date of the settlement, and there was a covenant for the settlement of after-acquired property, and the father had acted on the assumption that the settlement would remain in force. There was no equity to relief on the ground of mistake.

In *Carter* v. *Silber* (2) all the members of the Court of Appeal lay stress upon the fact that the father, but for the settlement, might have made a different will. [*Seaton* v. *Seaton* (3) was also referred to.]

W. J. Whittaker, for the respondent, was not called upon.

LORD COZENS-HARDY M.R. After listening to the careful and able argument of the appellant's counsel I have no doubt that the decision of Neville J. was right. The facts can be stated very shortly. A marriage settlement was executed in 1895, the parties to it being the intended husband, Mr. Carnell, the present appellant, who was a lady twenty years old, and two trustees. It was a settlement arranged in quite the customary manner by the mother of the lady, was drawn by the family solicitors, and was in form obviously for the benefit of the infant and her children, the husband not taking any interest under it. The property is settled upon the wife for life and then upon the children of the marriage, a power of appointment being reserved to their mother. There have been three children of the marriage, one of whom has now nearly attained the age of twenty-one years. The property settled was reversionary—it consisted of a reversion expectant on the appellant's mother's life interest, and the reversion has not yet fallen in. There were matrimonial disputes of which we do not know the

(1) [1893] A. C. 360. (2) [1892] 2 Ch. 278.
(3) (1888) 13 App. Cas. 61, 77.

rights or the wrongs; the husband is living apart from his wife, the wife is living apart from her children, who have been taken charge of by their grandmother and maintained by her, and the wife has not communicated with the children or with any members of the family; she has been living out of England during the greater part of this time and has refrained from communicating with them. In September, 1914, that is nineteen years after the date of the settlement, this action was commenced seeking a declaration that the settlement is not binding on the plaintiff and is voidable and ought to be set aside, and a declaration that the plaintiff is entitled to repudiate it. I have said already she was nearly twenty years old when she executed the settlement; therefore, to be more accurate, it is nineteen years since she attained twenty-one. We have been told this: granted that it is settled that an infant's contract may be repudiated, but that it must be within a reasonable time, that doctrine is qualified by the circumstances. First of all it is said that the husband did not bring any property into settlement—it was all the wife's property which was dealt with—and, that being so, there is nobody with whom a bargain of this kind could be made, and nobody could be disappointed if the plaintiff did not perform her contract. That is, with all respect to counsel, an extraordinary proposition. Marriage settlements constantly contain provisions with regard to property brought in by one of the spouses only. I never heard that in construing a contract or considering a question of repudiation of this kind it would be in any sense necessary to consider whether the husband brought in property as well as the wife. Then it is said there is nobody disappointed; the three children are all minors, they have not been entitled to a penny of the property hitherto, and they could not have dealt with their interests. That, again, is not the test. Those three children are within the marriage consideration, they could sue the trustees for any breach of trust, and undoubtedly have a contingent interest in the settlement funds; and for all the purposes of to-day it seems to me that their interests must be considered in exactly the same position as the mother's. The lady's daughter, who is now twenty, is of marriageable age, and she could with the leave of the Court settle her interest in this property. But that is of no importance whatever. I regard this as a case

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which is absolutely covered by authority from which we ought not in any way to depart. The case of *Carter* v. *Silber* (1) is one of the highest possible authority which came before the Court of Appeal consisting of Lindley L.J., Bowen L.J., and Kay L.J. They gave judgments which plainly cover this case; but I do not refer to them in detail, though they contain some very strong passages, because the case went to the House of Lords, where it was dealt with, if I may respectfully say so, by a very strong tribunal. In that case there were four years after the attainment of majority before repudiation. Lord Herschell (2) said this: "It is not disputed that this contract, executed and entered into by Martin Albert Silber was not absolutely void, but was voidable only"—that applies, of course, to the present case; the lady's contract was voidable only—" that is to say, that after he came of age it was as binding as if he had been of age at the time when he executed it, subject only to this, that the law enabled him to avoid his obligations provided he did so within a reasonable time." That is a general proposition of law. Then he says this (3): "The first question is whether the infant was entitled to wait until an actual sum of money came to him to which this covenant could apply before he made the repudiation. I think that is a proposition which it is absolutely impossible to regard with seriousness—that this covenant being binding unless he repudiates it within a reasonable time, he is entitled to wait to see how in respect of any particular sum of money the covenant will operate, and when he has made up his mind whether with regard to that sum of money it will be beneficial to him or not, he can then, and not till then, be said to have his proper opportunity of making the determination." Lord Watson says in a very short judgment (4): "If he chooses to be inactive, his opportunity passes away; if he chooses to be active, the law comes to his assistance." Lord Halsbury adopts the language of Lindley L.J., who said: "Whether the defendant could have repudiated the deed in five or six or nine months after he came of age I do not care to discuss; but to ask us to hold that he repudiated within a reasonable time is to ask us to hold that which no reasonable man could think of holding."

(1) [1892] 2 Ch. 278.
(2) [1893] A. C. 364.
(3) [1893] A. C. 365.
(4) Ibid. 366.

Lord Macnaghten, again, says (1): "It seems to me that every one who is of sufficient age and intelligence to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument which he executes; and therefore I think it is immaterial to inquire whether Mr. Martin Silber knew or did not know the particular covenant in question. I do not think he is entitled to any indulgence on the ground that he was not in fact aware of the obligation which he undertook." Then counsel said there was one observation which he was entitled to make on that case, namely, that the husband's father might have altered his testamentary disposition in favour of his son if he had known that he would repudiate the settlement; the father there had brought in property. That again is not any qualification of the general principles which are laid down by the noble and learned Lords. I say deliberately that the general principles laid down by the noble and learned Lords seem to me absolutely to cover the present case. Then counsel referred us to the decision of North J. in *In re Jones* (2), decided in the same year as *Edwards* v. *Carter* (3), but rather before it, and not cited in the House of Lords by either counsel, and he says that there the learned judge held that in considering what was a reasonable time it might be competent to say that reasonable time did not begin to run till the reversion fell into possession, or at least the fact that it was a reversionary interest which was settled was sufficient to excuse a delay of more than thirty years. With great respect to the learned judge I am unable to follow his judgment. He then says (4): "I think it is not an unreasonable time if she elects to repudiate the settlement when for the first time the question arises whether anything is or is not to be received by her or her trustees under it, and that question never arose, so far as I can see, until after the death of the tenant for life." If that is to be taken to be the view of the learned judge on this point I think it is plainly overruled by the decision of the House of Lords in the same year in *Edwards* v. *Carter* (3), and it certainly lays down a principle which, so far as I am aware, has no support from any prior decision of this or any other Court.

(1) [1893] A. C. 367.
(2) [1893] 2 Ch. 461.
(3) [1893] A. C. 360.
(4) [1893] 2 Ch. 469.

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For these reasons I think that the decision of the learned judge in this case was perfectly right, and the appeal must be dismissed with costs.

PHILLIMORE L.J. I am of the same opinion. I do not think that the differences between this case and that of *Edwards* v. *Carter* (1) are sufficient to distinguish it in any material respect, and I take the law laid down in *Edwards* v. *Carter* (1) and apply it in this case without difficulty. There are only three matters to be considered. The first is that in *Edwards* v. *Carter* (1) the infant, who was in that case the husband, had covenanted to settle after-acquired property, and there was a good deal of reason, in the opinion of the Lords Justices and the noble and learned Lords, for thinking that if the father of the infant had known he was going to repudiate that covenant he never would have devised benefits to him in the way that he did by his will. That is a topic to consider which is no doubt absent in this case, because the lady here did not covenant to settle after-acquired property, and she cannot therefore in any way be supposed to be diverting to herself benefits which she otherwise would not have got, because she was dealing with property already coming to her. That topic can be urged in proper cases, and that is all that can be said about it. The next point urged is that this is a reversionary interest and that it has not yet come into possession, and the decision of North J. in *In re Jones* (2) governs this case. The language of North J. in *In re Jones* (2) comes perilously near to an actual contradiction of the language of Lord Herschell in *Edwards* v. *Carter*. (3) If it amounts to saying that a spouse who was an infant when he or she married is not bound to take action to repudiate till actual sums of money are going to be handled by him or her one way or the other, according as the settlement stands or not, it is in exact contradiction to the passage I am now going to read (3): "The first question is whether the infant was entitled to wait until an actual sum of money came to him to which this covenant could apply before he made the repudiation. I think that is a proposition which it is absolutely impossible to

(1) [1893] A. C. 360. (2) [1893] 2 Ch. 461.
(3) [1893] A. C. 365.

regard with seriousness." If it is meant to say that the exigency is not quite so pressing when there is a reversionary interest to deal with, and that in considering what is a reasonable time you might prolong what would otherwise be a reasonable time by some fraction, I do not know that I am inclined to comment specially on what North J. said; but if it comes to anything more than that I respectfully disagree with his judgment. It is quite possible, as has been pointed out in the course of the argument, that the decision was quite right in the particular circumstances of that case, but the reasons given for it in my opinion go too far. The last point is this: whether or not the fact that the lady here did not know of her right of repudiation until quite late justifies her waiting all this time. That was expressly dealt with by the Lords Justices in *Carter* v. *Silber* in the Court of Appeal (1), and also dealt with in the House of Lords, where the noble Lords went a step further. In *Edwards* v. *Carter* (2) it was either assumed or proved for the benefit of the plaintiff that the plaintiff did not know what he had bound himself to do. The House of Lords said "that will not do; you must inquire." Of course, if he did not know what he had bound himself to do, he was not considering whether he could repudiate and escape from doing it. The House of Lords said he cannot even escape on the ground that he did not know what he had bound himself to do; it is his duty to inquire. He knows he has executed this solemn deed, and it is his duty speedily after he comes of age to inquire what he has bound himself to do, and if necessary to inform himself whether he can take proceedings to repudiate. Therefore *Edwards* v. *Carter* (2) is a stronger case than this. This lady knew from the beginning that she had executed a settlement; she does not deny that she knew that she settled these interests coming under the wills of her relations, and the letter that she wrote a year and a half before she brought her action shows that she not only then knew, but must have known for some time, what the contents of the settlement were. Therefore she is in a worse position than the plaintiff in *Edwards* v. *Carter*. (2) Neither of them knew the law; the plaintiff in *Edwards* v. *Carter* (2) did not know the facts, and yet he was held not entitled to relief. She knew the facts, and she ought not to be held entitled to relief.

(1) [1892] 2 Ch. 278. (2) [1893] A. C. 360.

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After this grave lapse of time, with the children growing up, naturally being educated and very likely told that there was some little fortune coming to them under their mother's settlement, to allow the mother to repudiate the settlement now would, in my opinion, be unjust and wrong, and I agree that this appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The only question we have to determine is whether the plaintiff repudiated this settlement within a reasonable time after March 18, 1896, when she came of age. She in fact repudiated it by the issue of a writ on September 10, 1914, that is to say, eighteen and a half years later. Now no doubt the question what is a reasonable time depends on the circumstances of the particular case. In this particular case the plaintiff knew that she had made a settlement; of that there is no doubt, because she says so in her evidence in terms. She must, according to the authority of all the learned Lords who decided *Edwards* v. *Carter* (1), be taken to have known and been acquainted with its provisions. Those provisions were entirely in favour of herself and her children; no other person had any interest whatever. She had three children, one of whom is now nearly twenty years of age, the other two being younger. In 1906 she left her husband and children—under what circumstances we do not know, and it is immaterial—but she left them in 1906 under the care of her mother, who has educated them ever since, and the plaintiff has had no communication with them since that date. She knew, and knows now, that they have nothing at all except their interest under this settlement. Now those seem to me to be the only circumstances of any materiality, except perhaps one other, namely, that the property was in reversion at the time when the settlement was executed, and has remained in reversion until the present time. But in my judgment, in this case at all events, that fact does not affect the question, and if the judgment of North J. in *In re Jones* (2) is to be taken as meaning that the reasonable time is to be calculated from the time when the interest falls into possession, then I respectfully disagree with it. In that case we do not altogether know what the

(1) [1893] A. C. 360. (2) [1893] 2 Ch. 461.

facts were, and it may have been on the facts of that particular case that North J. was justified in holding that nearly forty years was a reasonable time. It seems difficult to see how that could be so, but it may be that he was justified in so holding; but I must respectfully say that the reasons on which he founds his judgment by no means commend themselves to me. The plaintiff in this case not only knew that she had executed a settlement and must be taken to have known what its provisions were, but in my judgment she must be taken to have known when she attained twenty-one that that settlement, being a contract made by her when an infant, was one which could be repudiated by her, if she chose, on attaining twenty-one. That proposition is affirmed in terms by two of the learned Lords Justices in *Carter* v. *Silber* (1), and although not affirmed in terms by the speeches of the noble Lords in the House of Lords on appeal from that case, yet I think the affirmation of it is involved in their decision. The observations of those two learned Lords Justices will not receive any greater authority from anything that I may say, and I should have said nothing about it except that Neville J. in his judgment, while following and regarding himself bound by their decision, has expressed his personal disagreement with that particular reason on which it was founded. With the greatest respect I cannot agree with the observations of Neville J. on that part of the case. It seems to me that so common and so well known a rule of law that a contract made by an infant is in a different position to a contract made by an adult, and that in a case in which it is not void it may yet be avoided by the infant if he pleases when he comes of age, is a rule of law the knowledge of which may well be attributed to the person in question. I think, therefore, the fact that she was not actually advised of her rights until, as she says, about a year and a half before the trial of the action is not a feature to which we ought to attach any weight. Excluding that, it seems to me wholly impossible to say, under the circumstances which I have stated with regard to her family, that eighteen and a half years is a reasonable time, or rather that to repudiate the settlement at the expiration of eighteen and a half years from her minority is to do so within a reasonable time of her

(1) [1892] 2 Ch. 278.

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minority. For these reasons I think that the decision of the learned judge is right.

Solicitors: *A. F. Verulam Wild ; Hardisty, Rhodes & Hardisty.*

G. A. S.

C. A. 1916 *Feb.* 10.

In re DACRE.
WHITAKER *v.* DACRE.

[1913 D. 992.]

Administration—Defaulting Trustee—Insolvency of Trustee—Derivative Title to Legacy—Set-off or Retainer.

W. by his will appointed D. to be one of his executors and trustees and gave a legacy of 2000*l.* (which had not yet been paid) to D.'s wife. She died without having received the legacy, and having bequeathed the whole of her property to her husband, whom she appointed to be her executor. D. died insolvent without having proved his wife's will. By his own will he appointed executors to whom administration with the will annexed of his wife's estate was granted. On his death it was discovered that he had misappropriated 1500*l.*, part of W.'s estate :—

Held, that the surviving trustee and executor of W.'s will was entitled to retain the legacy as against D.'s liability to make good his default.

Decision of Sargant J. [1915] 2 Ch. 480 affirmed.

Jacubs v. *Rylance* (1874) L. R. 17 Eq. 341 and *Doering* v. *Doering* (1889) 42 Ch. D. 203 followed.

APPEAL from a decision of Sargant J. (1)

J. G. Womack, who died in 1904, by his will appointed Henry Dacre, Mary Matilda Womack (since deceased), and Frederick Womack his executors and trustees, and bequeathed a legacy of 2000*l.* to Alice Dacre, the wife of Henry Dacre. Alice Dacre did not receive payment of her legacy. She died on November 6, 1909, having by her will dated March 20, 1909, devised and bequeathed her real and personal estate to her husband, whom she appointed her sole executor. Henry Dacre never proved his wife's will or received any payment in respect of the legacy of 2000*l.* He died insolvent in May, 1913, having by his own will appointed J. W. Dacre and J. C. Dacre his executors, to whom

(1) [1915] 2 Ch. 480.

letters of administration with the will annexed to the estate of Alice Dacre were granted on June 12, 1915. On the death of Henry Dacre it was discovered that he had misappropriated 1500*l.*, part of the estate of J. G. Womack.

The present action was a creditor's action for the administration of Henry Dacre's estate. The conduct of the action had been given to Frederick Womack as surviving executor and trustee of the will of J. G. Womack, and a summons was taken out by him claiming a declaration that he was entitled to set off or retain such part of the legacy of 2000*l.* as had devolved beneficially on Henry Dacre to an extent sufficient to satisfy Henry Dacre's liability in respect of the misappropriation of the 1500*l.*

Sargant J. held that the applicant was entitled to succeed.

A creditor who had been appointed to represent the general creditors of Henry Dacre appealed.

Dighton Pollock, for the appellant. There is no right of set-off or retainer in this case. There never was a person who was entitled to receive the legacy and at the same time was liable to make good Henry Dacre's default : *Ex parte Morier*. (1) In *Cherry* v. *Boultbee* (2) the creditor of an uncertificated bankrupt gave a legacy to him for life with remainder as he should appoint, and it was held that, as the liability to pay the whole debt and the right to receive the legacy had never vested in the same person, the executors were not entitled, as against the legatee's assignees, to retain the legacy as against the debt. Henry Dacre never proved his wife's will ; he therefore never became entitled to receive and give a discharge for the legacy during his life. His executors are now entitled to receive it, and the trustee of Womack's estate cannot claim more than the proper dividend on Henry Dacre's debt : *In re Peruvian Railway Construction Co.* (3)

Sargant J. based his decision upon *Jacubs* v. *Rylance* (4) and *Doering* v. *Doering*. (5) In both those cases, however, there was one hand which was entitled to receive and liable to pay. See also *Wilson* v. *Leslie*. (6)

(1) (1879) 12 Ch. D. 491.
(2) (1839) 4 My. & Cr. 442.
(3) [1915] 2 Ch. 442.
(4) L. R. 17 Eq. 341.
(5) 42 Ch. D. 203.
(6) (1857) 5 W. R. 815.

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DACRE, *In re.* WHITAKER *v.* DACRE.

Owen Thompson, for the executors of Henry Dacre, supported the argument put forward on behalf of the appellant and in addition referred to *In re Towndrow.* (1)

A. C. Nesbitt, for the respondent, was not called upon.

LORD COZENS-HARDY M.R. This is an interesting point, and, although I cannot accede to the views of the appellant, the case has been argued extremely well and every possible contention has been put before us. The facts are short. The testator Womack gave four preferential legacies free of duty, including one of 2000*l.* to his sister Alice, the wife of Henry Dacre. Mrs. Dacre died on November 6, 1909, having by her will dated March 20, 1909, left all her real and personal estate to her husband and appointed him sole executor thereof. The conclusion I come to, if it be relevant,—I do not know that it is—is that there is sufficient proof that this lady really had no debts or liabilities ; there may have been some testamentary expenses, but that was all. The estate was practically a free estate, and her husband was therefore in the position of sole executor and sole beneficiary. Under those circumstances he could receive a legacy before probate ; that is perfectly clear. He could not maintain up to decree or judgment a suit against Womack's executors without producing to the Court the probate of his wife's will, but he could do everything short of that ; he could commence an action against the trustees and executors of Womack, and it would have been quite sufficient if the actual probate of his wife's will had been granted and could be produced at the date of the decree. Then Henry Dacre was in this position : he never in fact received the legacy of 2000*l.*, although he lived till 1913, nearly four years after his wife's death. The legacy had not then, and it has not yet, been paid. Henry Dacre died insolvent, having misappropriated part of Womack's estate, of which estate he was one of the trustees.

Under these circumstances what is the position ? It is contended that the principle of *Cherry* v. *Boultbee* (2) applies, but I think *Cherry* v. *Boultbee* (2) is not an authority to which it is necessary to refer. It has been settled by a long series of authorities, which are binding upon us, that a defaulting trustee cannot claim a

(1) [1911] 1 Ch. 662. (2) 4 My. & Cr. 442.

share in the estate unless and until he has made good his default, and the true principle, I think, is that which is laid down by Sir George Jessel in *Jacubs* v. *Rylance* (1), and which is again affirmed by Stirling J. in the case of *Doering* v. *Doering* (2), and lastly emphatically affirmed by Parker J. in *In re Towndrow* (3), where during the course of the argument he said this : " The real principle is that where there is an aggregate fund in which the trustee is beneficially interested and to which he owes something, he must be taken to have paid himself that amount on account of his share." That principle he lays down again in the same judgment, where, quoting the words of Stirling J., he says : " The theory on which that rule is based is that the Court treats the trustee as having received his share by anticipation, and the answer to any claim made by the trustee is this : ' You have already received your share ; you have it in your own hands.' " That doctrine has been applied not merely as against the defaulting trustee, but against his assignees for value. It has been applied against the defaulting trustee and his assignees although the default was after the date of the assignment. I cannot see any ground for holding that the persons claiming in right of the insolvent estate of Henry Dacre can be in any better position than the assignee for value of this particular property. For this short reason, without considering *Cherry* v. *Boultbee* (4), I think that Sargant J. was right in the view which he took. He holds that it has been settled by *Jacubs* v. *Rylance* (1) and *Doering* v. *Doering* (2) that the doctrine applies as much to a derivative share as it does to an original share. It was contended that nobody could have received the legacy ; that Henry Dacre could not have done so because he had not proved. That is not the law. He could have received it himself although he had not proved. That being so, I feel no doubt, in accordance with the law as laid down by the authorities, that the view of Sargant J. was right, and I think this appeal should be dismissed.

PHILLIMORE L.J. I am of the same opinion. The law is laid down by the Master of the Rolls, Sir George Jessel, in *Jacubs* v. *Rylance* (1) and followed by Stirling J. in *Doering* v. *Doering* (2)

(1) L. R. 17 Eq. 341.
(2) 42 Ch. D. 203.
(3) [1911] 1 Ch. 662, 666, 668.
(4) 4 My. & Cr. 442.

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and by Parker J. in *In re Towndrow* (1), and it seems to me to rest upon a thoroughly intelligible principle. Where a trustee who is also a beneficiary is found to have misapplied a portion of the trust funds, and therefore, technically speaking, to be a defaulter, yet if he is able to produce as much as is necessary to satisfy the other beneficiaries he is not really in default, but is to be treated as having paid himself by advance or in anticipation. That principle applies not merely to a trustee but to an assignee for value from a trustee; it also applies to the trustee although, in the first place, he was not a beneficiary, but has since acquired a beneficial interest by a derivative title. There, again, he is not allowed to aver that he has misappropriated the money; he is not supposed to have misappropriated the money if by any possibility he can be treated as having paid himself. Again, the assignee of a trustee taking under a derivative title will be in the same position. If possible it is to be understood that the trustee has properly applied the money; therefore it is not open to anybody claiming under the trustee to say he has not properly applied the money to the extent to which he is in default; to that extent he is deemed to have been paid. He may have been overpaid, but that is another matter, which it is not important to consider in this case. I think the learned judge was right, and that this appeal should be dismissed.

WARRINGTON L.J. I agree. Mrs. Dacre was entitled to a legacy under the will of the testator Womack, who died in 1904, and Henry Dacre was by her will appointed sole executor and sole legatee. He was also one of the executors and trustees of Womack. Henry Dacre died in 1913. At any time between 1904 and 1913, although he had not proved the will, he might have paid to himself as executor and legatee this legacy. During that period from 1904 to 1913, or during some part of it, he had in his hands money of the original testator out of which he might have paid the legacy. According to the principle already referred to as being laid down in *Jacubs* v. *Rylance* (2) and *Doering* v. *Doering* (3), having that money in hand, he must be treated as if he had paid himself, and neither he nor any person claiming through him can claim to be paid over

(1) [1911] 1 Ch. 662, 666, 668. (2) L. R. 17 Eq. 341.
(3) 42 Ch. D. 203.

again. That is the short point we have decided. I think Sargant J. was right and that his decision should be affirmed.

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DACRE, *In re.* WHITAKER *v.* DACRE.

Solicitors: *Maude & Tunnicliffe; Blundell, Gordon & Co., for Gordon, Hunter & Duncan, Bradford; Lindsay, Greenfield & Masons.*

G. A. S.

In re BOOTH.
PLEACE *v.* BOOTH.

[1915 B. 2235.]

YOUNGER J.
1916
Jan. 28; *Feb.* 1.

Revenue—Settlement Estate Duty—Estate Duty—Allowance for Settlement Estate Duty already paid—Apportionment between Persons interested in Estate—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

The amount of settlement estate duty allowed off the estate duty payable under s. 14 of the Finance Act, 1914, on the first occasion on which it becomes payable enures for the benefit of the several persons interested in the property in respect of which such estate duty is paid.

A testator, who died in 1913, by his will settled his residuary estate upon trust for A. for life, and then for other persons subject to the payment out of the income of a life annuity commencing on A.'s death. A. died in October, 1914, after the Finance Act, 1914, came into operation:—

Held, that the amount of settlement estate duty paid on the testator's death, which (pursuant to s. 14 (*b*) of the Act) was allowed off the estate duty payable on A.'s death, reduced the amount of estate duty for the benefit of the annuitant as well as of the residuary legatees.

Held, also, that the interest receivable under s. 14 (*b*) on the said amount of settlement estate duty for the period between August 15, 1914, and A.'s death belonged to A.'s representatives.

Held, further, that on the death of an annuitant, to whom an immediate annuity payable out of the income of the residuary estate was given by a codicil to the said will, the interest receivable under s. 14 (*b*) for the period between August 15, 1914, and the death of the annuitant on the amount of settlement estate duty paid in respect of the "slice" of the estate representing such annuity will belong to the annuitant's representatives.

ADJOURNED SUMMONS.

This was an originating summons taken out by Miss Charlotte Pleace against the executors of and the residuary legatees under the

YOUNGER J. 1916 BOOTH, *In re.* PLEACE *v.* BOOTH.

will and codicil of Arthur John Booth for the determination (inter alia) of the question whether the two annuities of 150*l.* given to her by the will and codicil respectively were subject to any and what deductions therefrom in respect of estate duty and settlement estate duty.

The facts were as follows :—

The testator, who died on August 19, 1913, by his will, dated October 30, 1906, gave his residuary real and personal estate to his executors upon trust for his sister, Elizabeth Booth, for her life, and after her death, if the plaintiff should survive her, to pay thereout the annual sum of 150*l.* to the plaintiff during the remainder of her life ; and by a codicil dated October 17, 1911, the testator directed that from and immediately after his death his executors should, out of the income of his residuary estate, pay a further annual sum of 150*l.* to the plaintiff during her life in addition to the reversionary annuity of 150*l.* given to her by his will.

The will and codicil contained directions empowering the executors to set aside so much of the capital of the residuary estate as they should think proper to provide by the income thereof for payment of the plaintiff's annuities, and subject to these annuities and sundry other gifts the testator gave the residue of his estate, after the death of his sister, to four named persons in equal shares.

On the testator's death his executors duly brought in their account of the property chargeable with settlement estate duty. In arriving at the amount chargeable the net residue was treated as an aggregate settled fund, no separate value being attributed either to the immediate annuity given to the plaintiff by the codicil or to the reversionary annuity given to her by the will. On that footing the capital sum charged with settlement estate duty amounted to 23,437*l.* 0*s.* 7*d.* At 2*l.* per cent. the duty was 468*l.* 14*s.* 9*d.*, and that amount with an arrear of interest was duly paid on January 6, 1914, no part of it being charged against the plaintiff. Of this sum 75*l.* was admitted to be the proportion of duty attributable to the "slice" of the residuary estate representing the immediate annuity.

On October 6, 1914, after the Finance Act, 1914, came into operation, Elizabeth Booth, the testator's sister, died. On her death 1215*l.* 17*s.* 11*d.* became payable for estate duty, subject to a credit for 393*l.* 14*s.* 9*d.* (namely, 468*l.* 14*s.* 9*d.* less 75*l.*), being the settlement

estate duty paid on the residuary estate less the "slice" representing the immediate annuity.

It was agreed that if the estate duty on Elizabeth Booth's death was to be treated as 1215*l.* 17*s.* 11*d.* the plaintiff would have to keep down the interest on a sum of 262*l.* 10*s.*, being the proportion of 1215*l.* 17*s.* 11*d.* attributable to the "slice" of the residuary estate representing the reversionary annuity; but the plaintiff claimed that the estate duty paid must be taken to be 1215*l.* 17*s.* 11*d.* less 393*l.* 14*s.* 9*d.*, and accordingly that the sum on which she would have to keep down the interest ought to be reduced from 262*l.* 10*s.* by a sum bearing to 262*l.* 10*s.* the same proportion that 393*l.* 14*s.* 9*d.* bore to 1215*l.* 17*s.* 11*d.*

H. Terrell, K.C., and *Percy Wheeler*, for the plaintiff. It is admitted that the plaintiff is liable to settlement estate duty on the immediate annuity given by the codicil.

[*Clauson, K.C.*, referred to *In re Parker-Jervis.* (1)]

As to the reversionary annuity given by the will, the estate duty payable under s. 14 of the Finance Act, 1914 (2), which applies to

(1) [1898] 2 Ch. 643.

(2) Finance Act, 1914, s. 14: "Any relief from the payment of estate duty given by sub-section (2) of section 5 . . . . of the Finance Act, 1894, ... shall cease in the case of any person dying after the 15th day of August, 1914, and settlement estate duty shall not be levied in the case of persons dying after the 11th day of May, 1914:

Provided that—

. . . . . .

(*b*) on the first occasion on which estate duty becomes payable in respect of any property which would not have been payable but for this section, the amount of settlement estate duty, if any, which has been paid in respect of that property, shall be allowed against the amount of estate duty payable on that occasion, and if it exceeds that amount, the excess shall be repaid to the estate, and in addition, a sum equal to simple interest on the said amount of settlement estate duty calculated at the rate of three per cent. per annum from the 15th day of August, 1914, up to the date of the occasion shall be paid to the several persons or their representatives who would have been entitled to the income arising from that amount, if that amount had on the 15th day of August, 1914, been added to the capital of the settled property, and shall be

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the case of persons dying after August 15, 1914, is subject to an allowance of the amount of settlement estate duty paid on the testator's death. It is admitted that the plaintiff must bear interest on so much of the estate duty as is attributable to the "slice" of the estate representing her annuity; but it is submitted that the plaintiff is only liable to be charged with interest on the actual sum which the trustees have paid—that is, on 1215*l.* less 393*l.* [They also referred to *In re Maryon-Wilson.* (1)]

Clauson, K.C., and *Howard Wright*, for the defendants, the executors and the residuary legatees. The persons who become entitled to the estate on Miss Booth's death have to pay 1215*l.* for estate duty, and the proportion attributable to the "slice" of the estate representing the annuity is 262*l.* 10*s.* The plaintiff is seeking to be put in the position she would be in if the estate duty was not 1215*l.* but 1215*l.* less the 393*l.* deducted for the settlement estate duty paid on the testator's death. But settlement estate duty never became payable in respect of the reversionary annuity, that duty having been abolished before the reversionary annuity became payable. Settlement estate duty was in fact only paid on the residuary estate. Therefore the plaintiff is not entitled to benefit by that reduction.

H. Terrell, K.C., in reply. Under the Act of 1914 the plaintiff is for the first time charged with estate duty in respect of the reversionary annuity. The statute repealed the provisions, which said that she should not be charged. The amount so charged is subject to a deduction in respect of settlement estate duty previously paid. The statute has not imposed an aggregate amount on anybody of more than 1215*l.* less 393*l.* There is nothing in the statute to impose liability on the plaintiff in respect of the full 1215*l.*

Cur. adv. vult.

Feb. 1. YOUNGER J. There has arisen in the administration of the estate of the testator a question under s. 14 of the Finance Act, 1914.

divided amongst those persons or their representatives according to the several interests they would have had in that income . . . ."

(1) [1900] 1 Ch. 565.

That section abolished settlement estate duty, and charged in place of it substantive estate duty upon every passing of the settled property from a limited owner to his successor. The question of the proper incidence of the new duty arises here, and, although it involves only a very small sum, it raises an important point of construction affecting large amounts in other cases. As a question of principle, therefore, it demands very careful consideration. [His Lordship stated the facts as above, and continued:] The questions which now arise with reference to estate duty are, first, whether the plaintiff ought to have been charged as between herself and the residue with settlement estate duty upon her immediate annuity; secondly, whether she is now, on the death of Miss Booth, chargeable by virtue of the Act of 1914 with estate duty in respect of her reversionary annuity; and, thirdly, whether if so chargeable she is entitled in arriving at the amount of such duty payable by herself to be credited with any part of the sum disbursed, as I have stated, by the executors for settlement estate duty upon the testator's settled residue and now re-credited under the new Act.

As regards the settlement estate duty upon the plaintiff's immediate annuity the executors were apparently advised at the time of the testator's death that such duty was chargeable against the ultimate residue and was not payable out of the plaintiff's annuity fund notional or actual. This view, however, cannot, in the face of the authorities upon the subject, be maintained, and it is not now seriously disputed that the plaintiff is chargeable with that duty, the amount of it to be arrived at in accordance with the principles laid down in the case of *In re Parker-Jervis.* (1) Accordingly, on the hypothesis that the proportion of residue sufficient to provide the annuity is 3750*l.*, the settlement estate duty of 2*l.* per cent. upon that amount becomes 75*l.*, and the plaintiff, subject to any question of amount, now submits, as I understand, to be charged from the testator's death and by way of deduction from her immediate annuity with an annual sum of 3*l.*, being the equivalent of 4*l.* per cent. upon the assumed amount of the duty.

And the second question, whether the plaintiff is now liable under the Act of 1914 for estate duty in respect of her reversionary annuity

(1) [1898] 2 Ch. 643.

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which fell in upon the death of Miss Booth, is, I think, equally free from doubt. There is no escape from that liability.

As to the amount with which she is chargeable, the Revenue authorities have agreed the amount of estate duty payable upon the death of Miss Booth in respect of the entire residue of the testator's estate which passed upon that event at 1215*l.* 17*s.* 11*d.*, of which 262*l.* 10*s.* is the duty payable in respect of the "slice" required to provide for the plaintiff's reversionary annuity if the value of that "slice" is again fixed at 3750*l.*

So far the rights of the parties are clear enough, and if there were no more in the case the plaintiff would, on the principle of *In re Parker-Jervis* (1), be chargeable during the rest of her life with 4*l.* per cent. per annum on the assessed duty in respect of the above "slice" as her contribution towards the estate duty upon the fund in which she is interested as an annuitant.

But under the Act of 1914 somebody is entitled to be credited against the above estate duty of 1215*l.* 17*s.* 11*d.* with 393*l.* 14*s.* 9*d.* and interest now receivable, that sum being the settlement estate duty paid upon the testator's death in respect of his settled residue after allowing for the 75*l.* duty attributed to the fund for providing the plaintiff's immediate annuity, for which of course credit cannot be obtained under the new Act until the occasion of her death; and the important question I have to determine is whether the plaintiff is entitled to have any portion of this credit of 393*l.* 14*s.* 9*d.* or of the interest thereon applied in reduction of the sum chargeable for estate duty in respect of her reversionary annuity, or whether the whole of the 393*l.* 14*s.* 9*d.* and interest goes in reduction of the estate duty now payable in respect of that part of the residue of the testator's estate which passed on Miss Booth's death to the four residuary legatees.

Now, although of course this question depends entirely upon the true construction of the Act of Parliament, it is important to note that the Act, providing as it does for the allowance of settlement estate duty paid before it was passed, is necessarily dealing with a payment made in accordance with the provisions of a settlement or will which had come into operation before the passing of the Act, which had necessarily been framed without regard to its pro-

(1) [1898] 2 Ch. 643.

visions and which, in the great majority of cases, had become incapable of alteration or modification to meet them. Further, the allowance provided for in the Act is in respect of a payment the burden of which, unless it had been thrown upon some other fund by the settlor or testator, must, under the Finance Acts, have been borne in every case by the settled property itself. Under these circumstances one would, I think, expect to find in the new Act, when it imposes a fresh duty upon settled property while making allowance in respect of duty previously paid thereon and now remitted, provision that the allowance shall go in relief of the new burden, and one may, I think, properly approach the consideration of the Act in that expectation.

Now s. 14, after providing that any relief from payment of estate duty given, amongst other sections, by s. 5 of the Finance Act, 1894, shall cease in the case of any person dying after August 15, 1914, and that settlement estate duty shall not be levied in the case of persons dying after May 11, 1914, contains, in sub-s. (*b*), the proviso that " on the first occasion on which estate duty becomes payable in respect of any property which would not have been payable but for this section, the amount of settlement estate duty, if any, which has been paid in respect of that property, shall be allowed against the amount of estate duty payable on that occasion, and if it exceeds that amount, the excess shall be repaid to the estate, and in addition, a sum equal to simple interest on the said amount of settlement estate duty calculated at the rate of three per cent. per annum from the 15th day of August, 1914, up to the date of the occasion shall be paid to the several persons or their representatives who would have been entitled to the income arising from that amount, if that amount had on the 15th day of August, 1914, been added to the capital of the settled property and shall be divided amongst those persons or their representatives according to the several interests they would have had in that income." Now, applying that proviso to the present case, it appears to me to have the following effect: that on Miss Booth's death, when estate duty for the first time became payable in respect of the plaintiff's reversionary annuity which would not have been payable but for the section, the amount of settlement estate duty, which was in fact paid in respect of the " slice " producing that annuity at the testator's death, is to be

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allowed against the new estate duty, and that the sum equal to simple interest on the amount of that settlement estate duty calculated at the rate of 3*l.* per cent. per annum from August 15, 1914, to October 6, 1914 (the date of Miss Booth's death), and payable by the Revenue authorities under the proviso, is to go to the legal personal representatives of Miss Booth, she being the person entitled to the income of the fund up to the date of her death.

It is suggested by Mr. Clauson that this is not the proper view and that the whole allowance both in respect of duty and interest must enure for the benefit of the residuary legatees as being the persons entitled to the "estate" referred to in the proviso, and he says that the plaintiff must pay interest upon the whole estate duty levied upon her "slice" irrespective of any allowance made by the Revenue authorities in respect of past payment of settlement estate duty. He asserts that no settlement estate duty has ever in fact been paid in respect of the plaintiff's reversionary annuity. I agree that it was not so paid in name; but the plaintiff's reversionary annuity was at the testator's death part of the residue, and settlement estate duty was, in my opinion, as truly paid in respect of it under that description as was settlement estate duty paid on the plaintiff's immediate annuity under the same description.

Nor do I think that the word "estate" in the proviso has the meaning attributed to it by Mr. Clauson. In my opinion it means the property out of which or in respect of which the payment was made. That seems to me to be the natural meaning of the word in the context in which it appears, and it produces the effect which, I should suppose on general principles, the Legislature intended to achieve. To place upon it the meaning suggested by Mr. Clauson would produce a result so extraordinary that it cannot, I think, be imputed to the Legislature unless no other construction of its language is possible.

For, as I have said, the duty allowed in the vast majority of cases, if not in every case, must have been paid either out of the settled property or in respect of it under a burden imposed upon some other property by the testator or settlor, and the new duty is charged upon the same settled property, yet the allowance would, on Mr. Clauson's construction, go to the aggrandisement of other property

which had provided none of it, and, even in a case where the new duty was less than that remitted, the whole remission would be diverted from the settled property, which would be left to bear the new burden in its entirety.

Further, as Mr. Terrell pointed out, the language of the section points to a deduction from a payment, which goes to show that the Legislature had in mind an allowance to the person liable for the new payment by a credit of that previously made in his relief.

As to the interest, the effect of the provision is, I think, clear and has the result I have indicated. The amount involved in the present case is microscopic, but the interest on the settlement estate duty paid in respect of the "slice" producing the plaintiff's immediate annuity may later on be considerable. That interest will, on the principle I have stated, go to the plaintiff's representatives when on her death it becomes payable. And the effect of Mr. Clauson's construction of the whole section is very clearly shown by a reference to this question of interest. The residuary legatees are during the plaintiff's life to receive interest at the rate of 4*l.* per cent. per annum on that settlement estate duty by the annual deduction of it from her annuity; if they were also to receive from the Revenue authorities interest on the same duty since August 15, 1914, they would be receiving interest on the same sum twice over, while the plaintiff would continue to be charged with interest on a duty which is now remitted.

In the result, therefore, I am of opinion that, as between herself and the residue, the plaintiff is entitled to have the sum of 262*l.* 10*s.* treated as paid for estate duty upon the "slice" above referred to reduced by a sum which shall bear to that amount the same proportion that the sum of 393*l.* 14*s.* 9*d.* bears to the sum of 1215*l.* 17*s.* 11*d.* The plaintiff's estate will also be entitled to receive, when it is paid by the Revenue authorities, interest at 3*l.* per cent. per annum on the settlement estate duty paid in respect of the "slice" which provided her immediate annuity from August 15, 1914, until the day of her death, when that occasion occurs.

Solicitors: *Vallance & Vallance; Morley, Shirreff & Co.*

W. I. C.

NEVILLE J.

1916

Feb. 24.

In re SICHEL'S SETTLEMENTS.

SICHEL *v.* SICHEL.

[1915 S. 2965.]

Settlement—Power to appoint New Trustees—Subsidiary Settlement—Power imported by Reference—Appointment of New Trustees—Event not specified in Power—Invalid Appointment—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 10, 25, 35.

In 1882 life policies were by deed assigned to the trustees of an 1877 settlement to hold upon the same trusts and with, under, and subject to the same powers, provisoes, agreements, and declarations as in the 1877 settlement contained. That settlement contained a power to appoint new trustees in the event (amongst others) of a trustee becoming incapable to act, but did not include the event of a trustee being unfit to act. This latter event is one of those specified in sub-s. 1 of s. 10 of the Trustee Act, 1893, which is a retrospective enactment.

In July, 1914, F. C. and O. S. were the trustees of both settlements, and subsequently the donees of the power in the 1877 settlement executed a deed whereby, after reciting that F. C. had become incapable and O. S. by reason of his breaches of trust was unfit to act, they, in exercise of that power, appointed two persons to be trustees of both settlements in the place of F. C. and O. S. :—

Held, that the power of appointing new trustees in the 1877 settlement was by reference imported into the settlement of 1882.

But *held*, on the authority of *In re Wheeler and De Rochow* [1896] 1 Ch. 315, that the donees of the power were restricted to the particular events specified in the power, and therefore that the appointment was bad, and new trustees were appointed by the Court.

The decision of Kekewich J. in *In re Wheeler and De Rochow* (supra) disapproved of, but followed as it has been treated as an authority since 1896.

ADJOURNED SUMMONS.

By a deed dated August 16, 1877 (being the settlement made on the marriage of the plaintiffs Mr. and Mrs. Sichel), certain chattels and securities were assured to two trustees upon trust for Mrs. Sichel for life and after her death for Mr. Sichel for life, and after the decease of the survivor of them upon usual trusts for the issue of their marriage at twenty-one or marriage. The deed contained a declaration that "if and so often as any of the trustees hereby

appointed or any future trustee or trustees of these presents shall die or go to reside abroad or shall desire to retire from or refuse or become incapable to act in the trusts of these presents" it should be lawful for the plaintiffs during their joint lives and for the survivor of them during his or her life "to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or going to reside abroad or desiring to retire or refusing or becoming incapable to act."

By a deed dated March 3, 1882, indorsed upon the said settlement of 1877, Mr. Sichel assigned two policies of assurance on his own life and the moneys payable thereunder to the then trustees of the settlement of 1877 upon trust "that the trustees or trustee for the time being of these presents" should upon the death of Mr. Sichel receive the moneys assured by and to become payable under the said policies respectively and should out of the said moneys in the first place pay the expenses of and incidental to the obtaining payment thereof respectively, and should "stand possessed of the residue of the said monies upon the same trusts and with and subject to the same powers provisoes agreements and declarations as in the within written indenture declared and contained" concerning the trust premises comprised in the within written indenture or as near thereto as the death of Mr. Sichel and other circumstances would admit. The deed of March 3, 1882, did not contain a power to appoint new trustees.

The plaintiffs had only two children who attained the age of twenty-one, namely, Otho Sichel and the defendant Maria Sichel.

In 1892 and 1906 the plaintiffs, in exercise of the power to appoint new trustees in the settlement of 1877, appointed a new trustee of the settlements of 1877 and 1882, and from 1906 the trustees of both settlements until the deed next after stated were F. Canthal and Otho Sichel.

By a deed dated October 12, 1914, and made between the plaintiffs of the one part and the defendants Maria Sichel and F. Sabel of the other part, and expressed to be supplemental to the settlements of 1877 and 1882 (called "the principal indentures"), after reciting that Otho Sichel, by reason of breaches of trust committed by him, was unfit to act as a trustee of the principal indentures and it was not known if he was alive or dead, and that F. Canthal, being an

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alien enemy, was no longer capable of acting as a trustee thereof, and reciting that the plaintiffs were desirous of appointing the defendants Maria Sichel and F. Sabel to be trustees of the principal indentures in the place of the said F. Canthal and Otho Sichel, it was witnessed that, in exercise of the power for that purpose contained in the principal indenture of 1877 and of all other powers (if any) them thereunto enabling, the plaintiffs thereby appointed the defendants Maria Sichel and F. Sabel to be trustees of the principal indentures for all the purposes thereof, or such of the same purposes as might be subsisting and capable of taking effect, "in the place of the said F. Canthal and Otho Sichel." Then followed the usual vesting declaration.

In 1915 it was proposed to deal with some bonuses declared on the policies, but the insurance office raised doubts as to the validity of the appointments made by the deed of October 12, 1914. Thereupon the plaintiffs issued this summons under the Trustee Act, 1893, (1.) to determine whether the deed of October 12, 1914, operated to effect a valid appointment of the defendants as trustees of the two settlements of 1877 and 1882 respectively in the place of F. Canthal and Otho Sichel and to vest in the defendants the property subject to the trusts of the two settlements; (2.) if the deed of October 12, 1914, did not so operate, then that the defendants might be appointed trustees of the said settlements of 1877 and 1882 respectively in the place of Otho Sichel, who was unfit to act in the trusts thereof and was out of the jurisdiction, and of F. Canthal, who was an alien enemy and out of the jurisdiction. The summons also asked for a vesting order.

It appeared that Otho Sichel misappropriated some of the trust funds and disappeared in July, 1914, after telling some of his friends that he intended to make away with himself, and at the date of the deed of October 12, 1914, it was thought that he might have committed suicide, but it had recently been ascertained that he was residing in India. F. Canthal was and always had been a German subject and was resident in Germany. The plaintiffs were naturalized British subjects.

Owen Thompson, for the plaintiffs. The first question is whether the power to appoint new trustees in the 1877 settlement is by

reference incorporated with the settlement of 1882. It is submitted that the words "to hold upon the same trusts and with, under and subject to the same powers," &c., in the 1882 settlement are sufficient for the purpose. There is no direct authority on the point, but in *In re Curteis' Trusts* (1) Bacon V.-C. held that a power to appoint trust funds among children could be exercised over an augmentation of the trust funds, and it is submitted that by analogy the same principle applies to the exercise of a power to appoint new trustees of an augmented fund.

[NEVILLE J. I think the power to appoint new trustees in the settlement of 1877 is by reference imported into the settlement of 1882.]

The next question is whether the appointment of October, 1914, is good. F. Canthal is a German subject resident in Berlin, and it is submitted that on the commencement of the war in August, 1914, he became an alien enemy and incapable to act.

[NEVILLE J. I think an alien enemy is clearly incapable to act as a trustee because he cannot sue.]

The difficulty is with regard to O. Sichel. At the date of the appointment he had absconded, and it was not known that he had gone to reside abroad. He was clearly unfit to be a trustee, and if s. 10 of the Trustee Act, 1893 (2), enlarges the power of the plaintiffs

(1) (1872) L. R. 14 Eq. 217.

(2) The Trustee Act, 1893, s. 10 (so far as material), enacts :—

"(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid."

"(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and

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the appointment would seem to be good. But in *In re Wheeler and De Rochow* (1) Kekewich J. decided, on the construction of the section, that the donees of a power of appointing new trustees in an instrument are restricted to the particular events specified in the instrument.

[NEVILLE J. I do not approve of that decision for the reasons that I shall give, but as it has stood since 1896 I feel I must treat it as a binding authority although I differ from it.]

It is submitted that the appointment of one of the new trustees in the place of F. Canthal may be good.

[NEVILLE J. It is a joint appointment and does not state which of the new trustees is appointed in the place of the former trustee. I think the appointment is bad.]

Then we ask the Court to appoint the defendants trustees of both settlements on production of the usual affidavit of fitness to the registrar. The defendant F. Sabel is a British subject, and it is submitted that under the circumstances there is no objection to the defendant M. Sichel although she is a beneficiary.

W. Banks, for the defendants.

NEVILLE J. In this case the question raised is whether an appointment of new trustees is good, and it arises in this way. The power of appointment is vested as a joint power in the husband and wife, and it arises "if and so often as any of the trustees shall die or go to reside abroad or desire to retire from or refuse or become incapable to act in the trusts of these presents." What happened was that one of the trustees disappeared prior to the date of the intended appointment and he was subsequently discovered in India, but there is no evidence to show that he had left the country or had gone to reside abroad prior to the date of the execution of the appointment. With regard to the other trustee, on the outbreak of war he became an alien enemy and in my opinion thereupon became incapable to act in the trusts. It would seem, therefore, that with regard to the appointment of one trustee the

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to any provisions therein contained.

"(6.) This section applies to trusts created either before or after the commencement of this Act."

(1) [1896] 1 Ch. 315.

power had arisen, but with regard to the appointment of the other trustee the power had not arisen. The two new trustees are appointed jointly as trustees in the place of the two who were supposed to have forfeited their position within the terms of the power of appointment in the settlement, and I think therefore the appointment was wholly bad because one trustee was not appointed in the place of one of the outgoing trustees, nor was the other appointed in the place of the other outgoing trustee. It was a joint appointment, and I cannot say which of those trustees is to be held to represent the former trustee who was supposed to have gone to reside abroad. Therefore the appointment was bad. But, undoubtedly, if s. 10 of the Trustee Act, 1893, was an enabling power to the persons nominated in the settlement to appoint new trustees, the appointment in the present case would be good, because the words used in sub-s. 1 of that section include any person who is "unfit to act therein," that is, in the trusts. There is no question that both these trustees were unfit to act in the trusts, because the one who absconded had been guilty of the grossest defalcations previously; but it is said I am precluded from holding that the power given by sub-s. 1 of s. 10 can be exercised by the persons nominated in the deed to appoint new trustees unless the words contained in the deed indicating the occasions upon which the appointment can be exercised correspond precisely with those contained in sub-s. 1. What precludes me is a decision of Kekewich J. in the year 1895 in the case of *In re Wheeler and De Rochow* (1), which I understand has been treated as an authority ever since, and which, therefore, I think I have no power to interfere with, in which he held that the words "person or persons nominated for the purpose of appointing new trustees by the instrument creating the trust" in sub-s. 1 of s. 10 refer to the person or persons nominated for the purpose of appointing new trustees in the particular event which has happened. On reading Kekewich J.'s judgment it seems to me that the meaning of that is that the power of the person or persons nominated for the purpose of appointing new trustees in the instrument are not enlarged in any sense by s. 10, sub-s. 1, but you are still bound to see whether they are purporting to exercise the power given by the words contained in the instrument, and if the event there

(1) [1896] 1 Ch. 315.

NEVILLE J. 1916 SICHEL'S SETTLEMENTS, *In re.* SICHEL *v.* SICHEL.

referred to has not happened, then the appointment is bad. That seems to me to be, at all events in part, founded upon an interpretation placed upon sub-s. 5 of s. 10, which says "This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained." I do not think that means to refer to a case where the words used in the power of appointment in the instrument are not so extensive as the words used in s. 10. If it be so, I cannot conceive why the persons nominated for the purpose of appointing new trustees should be included in the operation of the section at all, because it leaves them precisely where they stood before, and I see no advantage in an appointment under the Act over an appointment under the terms of the instrument. In my opinion the words of sub-s. 1 of s. 10 are quite plain and give to the persons nominated in the instrument for the purpose of appointing new trustees a power to appoint in the cases referred to in the early part of the sub-section, unless in the instrument is to be found a contrary intention expressed, and that, I think, does not mean a case where the words are not co-extensive in the instrument with the words of the Act. I think that is not the expression of a contrary intention at all. Therefore, if I were free to exercise my own judgment in the matter, I should declare that the appointment was good; but I think I am bound to follow the decision of Kekewich J., although I cannot say that I concur in it, and the consequence is I hold that the appointment is bad. I will make an order appointing the defendants trustees of both settlements with the usual vesting order.

Solicitors for all parties: *Swepstone, Stone, Barber, Ellis & Co.*

H. L. F.

Not followed. Re BIDIE (decd.). [1948] 1 All E.R. 885.

Not followed. Re BIDIE, DECD. [1948] Ch. 697

In re STILLWELL.
BRODRICK *v.* STILLWELL.

[1915 S. 2866.]

SARGANT J.
1916
Feb. 1.

Husband and Wife—Judicial Separation—Alimony—Arrears due at Husband's Death—Liability of his Estate—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 17.

Where an order has been made against a husband for judicial separation and for payment of alimony, his widow may recover against his estate, if solvent, any arrears of alimony due at his death.

Quaere whether the arrears are recoverable if the husband's estate is insolvent.

In 1909 a decree for judicial separation was made on the petition of Mrs. Stillwell against her husband, the testator, and the Court ordered that the husband should pay to the petitioner out of his then income, and until further order, permanent alimony at the rate of 1*l.* 15*s.* a week from March 31, 1909, to be payable monthly. The alimony was paid only at irregular intervals, and at the husband's death in 1912 the amount in arrear was about a year's alimony. The husband left his property away from his wife, and his executor now raised by originating summons the question whether the testator's estate was liable to pay the arrears of alimony due at his death.

Dighton Pollock, for the executor, stated the facts and the question raised by him.

Owen Thompson, for Mrs. Stillwell. The arrears of alimony are a debt which is provable against the estate of the deceased husband, and the executor, having ample assets in hand, should be ordered to pay it. By s. 17 of the Matrimonial Causes Act, 1857, where the Divorce Court has made an order for judicial separation, and the application is by the wife, the Court "may make any order for alimony which shall be deemed just." By s. 1 of the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), where monthly or weekly sums had been ordered to be paid for a wife's maintenance or support, if the husband afterwards from any cause became unable to make such payments, the Court might discharge or modify the order, or temporarily suspend it as to the whole or any part of the money

SARGANT J. 1916 STILLWELL, *In re.* BRODRICK *v.* STILLWELL.

so ordered to be paid, and might again revive the order, wholly or in part, as the Court thought fit. Although the future weekly or monthly payments are not a "debt or liability" within s. 37 of the Bankruptcy Act, 1883, and cannot be proved for in the husband's bankruptcy, he is, notwithstanding his bankruptcy, liable to continue the payments, and the arrears constitute "a debt due in pursuance of an order or judgment of a competent Court," within the meaning of s. 5 of the Debtors Act, 1869, and are enforceable, under that section, during the husband's lifetime: *Linton* v. *Linton*. (1) Even arrears of alimony are not provable in bankruptcy: *Kerr* v. *Kerr*. (2) An action at law for recovery of arrears of alimony would not lie against the husband, the remedy being that which was pointed out by s. 52 of the Matrimonial Causes Act, 1857, namely, in the same manner as judgments, orders, and decrees of the Court of Chancery might be enforced and put in execution: *Bailey* v. *Bailey* (3); *Robins* v. *Robins*. (4)

The order could, therefore, before the Debtors Act, have been enforced by attachment. Sect. 1 of the Matrimonial Causes Act, 1866, was repealed by s. 2 of the Matrimonial Causes Act, 1907. Alimony ordered on a judicial separation being decreed is not assignable, but is "an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time," and which the Court may alter or take away whenever it pleases: *In re Robinson*. (5) And alimony cannot be released without the Divorce Court's sanction, and a wife cannot bind herself not to enforce payments of it in the future: *Watkins* v. *Watkins*. (6)

But although alimony is not enforceable at law during the husband's lifetime, and is not provable in his bankruptcy, it is nevertheless a debt, and arrears of it can after his death be enforced against his estate, for the Divorce Court's jurisdiction is then gone, and if the wife cannot come on the estate she is without remedy.

J. F. W. Galbraith, for an infant interested under the will. The arrears are not a debt which is enforceable, after the husband's death, either against his estate or against any one. The liability is

(1) (1885) 15 Q. B. D. 239.
(2) [1897] 2 Q. B. 439.
(3) (1884) 13 Q. B. D. 855.
(4) [1907] 2 K. B. 13.
(5) (1884) 27 Ch. D. 160, 164.
(6) [1896] P. 222, 226.

purely personal, like that of the putative father under a bastardy order, against whose estate, after his death, the mother has no claim either for arrears or future payments: *In re Harrington.* (1) In the husband's lifetime the alimony was not only not a provable debt, but was no debt at all, as shown by the cases cited, and payment of the amount could only be enforced by proceedings in the Divorce Court: *Ivimey* v. *Ivimey.* (2) There are cases in which the Court has interfered with respect to future payments but not with respect to past payments, but there is no case showing that the Divorce Court cannot interfere with past payments: per Grove J. in *Bailey* v. *Bailey.* (3) Probably that Court might, even now, make some order as to the arrears.

[SARGANT J. referred to *Stanhope* v. *Stanhope.* (4)]

If the husband's estate is insolvent, s. 10 of the Judicature Act, 1875, makes the bankruptcy rule applicable, and it would be strange if there was a different rule in the case of a solvent estate. [Reference was also made to *Vandergucht* v. *De Blaquiere* (5), as to the Court of Chancery granting writs of ne exeat regno in cases of alimony, and to *Prescott* v. *Prescott.* (6)]

SARGANT J. On the face of the order it would seem that the husband's estate would be liable just as he was in his lifetime, but possibly in a different manner. It has been contended, however, that under such an order there is no debt enforceable at law, and that the order is only enforceable by attachment under the Debtors Act, 1869—a remedy no longer available in this case—and therefore that the widow has no remedy at all. If that is the case, it is a startling result, and every wife who has obtained an order for alimony against her husband and whose husband has predeceased her loses all arrears due to her at his death. I am not going so to hold unless forced to do so by decided cases.

Many cases have been cited which show that alimony is a judicial assessment of the husband's obligation to maintain his wife; that the alimony is inalienable, and is not got rid of by the husband's bankruptcy, or by assignment, or even by agreement between the

(1) [1908] 2 Ch. 687.
(2) [1908] 2 K. B. 260.
(3) 13 Q. B. D. 855, 857.
(4) (1886) 11 P. D. 103.
(5) (1838) 8 Sim. 315.
(6) (1868) 20 L. T. 331.

SARGANT J. 1916 STILLWELL, *In re.* BRODRICK *v.* STILLWELL.

parties; and that the Courts have recognized that it cannot be sued for at law in the husband's lifetime, because it is still subject to the jurisdiction of the Divorce Court, which can alter the order, not only as to future payments, but also as to actual arrears. But because the Court to deal with the order during the husband's lifetime is the Divorce Court, that is, in my judgment, no reason for holding that arrears cannot be enforced as a debt after the jurisdiction of that Court has come to an end by reason of the husband's death.

In *Linton* v. *Linton* (1) the Court of Appeal decided that, although future payments of alimony were not a "debt or liability" within s. 37 of the Bankruptcy Act, 1883, and were not provable in bankruptcy, arrears of such payments constituted a debt enforceable under s. 5 of the Debtors Act, 1869. The remedy by attachment goes, of course, by the husband's death, but when his estate is ample, as in this case, to pay the arrears, there is no reason why this Court should not compel his executors to pay this debt in priority to the claims of beneficiaries under his will. Mr. Galbraith has ingeniously argued that, if the estate of a deceased husband is insolvent, s. 10 of the Judicature Act, 1875, makes the rule in bankruptcy applicable to the administration of his estate, and that it would be strange if a different rule applied when the estate was solvent. The case of the liability of an insolvent husband's estate for arrears of alimony may arise hereafter, and may need separate consideration; but here, as there is undoubtedly a debt and the only opposition is on behalf of beneficiaries under the will, I must make an order for payment of the arrears, not exceeding those for one year.

The decision in *In re Harrington* (2), as to arrears under a bastardy order, has not, in my judgment, any application to the present case.

Solicitors: *Bell, Brodrick & Gray; White & Co.*

(1) 15 Q. B. D. 239. (2) [1908] 2 Ch. 687.

F. E.

In re SMITH.

SMITH *v.* SMITH.

[1915 S. 3430.]

SARGANT J.

1916

Feb. 14.

Will—Forfeiture Clause—General Clause applicable to both Vested and Contingent Gifts—Alienation while Gift contingent—Repugnancy.

A testator gave a legacy of 100*l.* to his wife, a lease of his business premises to one of his two sons, the goodwill to his two sons, and a number of pecuniary legacies to several persons, all these gifts taking effect on testator's death. He gave the residue of his property upon trust for his wife during widowhood and, after her death or remarriage, unto and equally between such of his children as should then be living. The will then contained a forfeiture clause providing that if (by reason of bankruptcy or any other act or deed of any beneficiary under the will, or by operation of law) any share, interest, legacy, income, or other benefit under the will, if his or her own absolute property, in the absence of the clause would become vested in or payable to or for the benefit of any assignee or creditor of such beneficiary, then, as to the whole or part which, but for the clause, would be so vested or payable, the trusts declared in favour of the beneficiary should cease and determine, and the trustees of the will should hold such interest or benefit for the use, maintenance, or benefit of the beneficiary or his or her family in such manner and at such times or periods as the trustees should think best. Between the deaths of the testator and his widow one son was adjudicated a bankrupt and a daughter assigned her interest by way of mortgage :—

Held, that the forfeiture clause could not be split up so as to be pronounced valid as to the contingent gifts only, but that the whole of the clause was void for repugnancy, and that it was immaterial that the events on the happening of which forfeiture was alleged to have taken place occurred while the interests said to be affected were contingent.

In re Jones's Will (1870) 23 L. T. 211 approved.

Samuel T. Smith, by his will dated November 30, 1900, after appointing his wife and a son and daughter executors, gave his wife a legacy of 100*l.* and gave the lease of his business premises to his son Reginald M. Smith. He then directed his executors to sell the stock in trade in his business and to hold the net proceeds of sale as part of his residuary estate ; and gave to his sons Reginald M. Smith and Herbert M. Smith the goodwill of his business in unequal proportions. He then directed his executors to sell certain books,

SARGANT J. 1916 SMITH, *In re.* SMITH *v.* SMITH.

prints, and engravings at one of his two private residences, and that the proceeds of sale should form part of his residuary estate, and gave one fourth of his book debts to Reginald M. Smith and directed that the remaining three fourths should form part of his residuary estate. He then gave certain pecuniary legacies, including 1000*l.* to Reginald M. Smith and 300*l.* to each of his daughters. And the testator thereby directed that his wife should, within a reasonable time, select which of his two houses she would reside in, and gave to her the use and occupation thereof, with the furniture therein (except the books, prints, and engravings previously bequeathed), rent free during her life, and directed his executors to sell the house not so chosen and the contents thereof, and after his wife's death the house chosen by her, and to hold the proceeds of such sales as part of his residuary estate. And the testator thereby gave to his said trustees the residue of his real and personal property and estate, upon trust to pay the income thereof to his wife during her life or widowhood, and upon her death or remarriage he gave his said residuary estate unto and equally between such of his children as should then be living.

The will then proceeded as follows: "Provided always, that if, by reason or virtue of bankruptcy or any other act or deed of any beneficiary under this my will, or by operation of law, any share, interest, legacy, income or any other benefit given by this my will, or any part thereof, if his or her own absolute property, in the absence of this proviso to the contrary would become vested in or payable to or for the benefit of any assignees or assignee, creditors or creditor of such beneficiary, then, as to the whole or such part or parts of the said share, interest, legacy, income or other benefit as shall or but for this proviso would be so vested in or payable to any assignees or assignee, creditors or creditor of the said beneficiary, the trusts or trust hereinbefore declared in favour of such beneficiary shall thenceforth cease and determine, and my said trustees or trustee shall thenceforth, as respects all or so much of the said share, interest, legacy, income or other benefit as to which there shall have been such cesser or determination as aforesaid, hold or pay the same, in trust to hold and apply such share, interest, legacy, income or other benefit, or any part thereof, to or for the use, maintenance or benefit of such beneficiary, or his or her family

in such manner and at such times or periods as my said trustees shall in their absolute and uncontrolled discretion think best, having regard to all the circumstances of the case."

The testator died on April 19, 1904, and his widow died on December 9, 1914.

Reginald M. Smith in the widow's lifetime, namely, on June 22, 1910, was adjudicated a bankrupt, and at the time of the hearing of the summons below mentioned the bankruptcy was still continuing, and Mr. Egerton Spencer Grey, the Official Receiver in Bankruptcy, was the trustee in the bankruptcy.

Florence E. M. Newman, a daughter of the testator, in the lifetime of her mother, namely, on May 26, 1909, assigned to Herbert M. Smith, by way of mortgage to secure 200*l.* and interest, all the share and interest to which she was then or might thereafter become entitled in the residuary estate of the testator.

The trustees of the will, by originating summons, raised the questions (inter alia) whether, by reason of Reginald M. Smith's bankruptcy in the widow's lifetime, the forfeiture clause in the will took effect as to his share thereunder; and whether, by reason of Florence E. M. Newman having executed the mortgage in the widow's lifetime, the forfeiture clause took effect as to her share.

A. St. John Clerke, for the trustees of the will, stated the facts and the questions involved.

R. M. Pattisson, for a person descended from one of the persons whose shares were said to be forfeited. On the bankruptcy of Reginald Smith there was in law an assignment of his share, which became vested in his trustee, and the forfeiture clause came into operation. The clause also took effect when the daughter assigned her share by way of mortgage, for there are no words in the mortgage restricting it to the mortgagor's absolute interest in the future. Both acts of forfeiture took place while the interests of these two persons were contingent, and the forfeiture clause is therefore applicable and is valid.

[SARGANT J. But if a forfeiture clause applies not only to interests while they are reversionary but also when they are absolute, is not the whole clause void as being repugnant?]

It is submitted that that is the law, but that regard must be

SARGANT J. had to what has actually occurred, the passing away of the contingent interest by an act of the owner which is specified in the clause. Where the interest said to be forfeited was partly only in remainder the clause was held to be valid : *Kearsley* v. *Woodcock.* (1) It is immaterial that the act which is relied on as causing the forfeiture took place in the lifetime of a person having a previous life interest : *In re Payne.* (2) Such a forfeiture clause as this would be void for repugnancy if it were annexed only to an absolute gift, but it is valid in so far as it is attached to contingent gifts, or even vested gifts which are liable to be divested : *In re Porter* (3) ; *Churchill* v. *Marks.* (4)

1916

SMITH, *In re.* SMITH *v.* SMITH.

W. R. Sheldon, for Reginald Smith's trustee in bankruptcy. On the true construction of the forfeiture clause it must be held to be quite general in its terms and to apply to every legacy and interest given by the will, whether absolute or otherwise, to any beneficiary thereunder. If that is the right construction, the clause is repugnant and wholly void ; and it cannot be split up and held to be valid as to contingent interests and void as to absolute interests. The case is very like *In re Jones's Will* (5), where the gift of the property held to be forfeited was subject to a prior life interest. [He also referred to *In re Wolstenholme* (6) and *Powell* v. *Boggis.* (7)]

George Henderson, for Florence Newman, and *T. H. Attwater*, for her mortgagee, supported the argument of the trustee in bankruptcy.

SARGANT J. The summons in this case raises the question whether certain interests given by the testator's will, which were contingent reversionary interests, are within the forfeiture clause contained in the will, and, if so, whether that clause is wholly or in part invalid.

The testator gave a legacy of 100*l.* to his wife and specifically gave the lease of his business premises to one of his sons. Later on in his will he gave the goodwill of his business to his two sons in unequal shares, and gave a number of pecuniary legacies and made other bequests to other persons. Then he gave his residuary real

(1) (1843) 3 Hare, 185.
(2) (1858) 25 Beav. 556.
(3) [1892] 3 Ch. 481.
(4) (1844) 1 Coll. 441.
(5) 23 L. T. 211.
(6) (1881) 43 L. T. 752.
(7) (1866) 35 Beav. 535.

and personal estate upon trust to pay the income to his wife during her widowhood; and upon her death or remarriage he gave his residuary estate unto and equally between such of his children as should then be living. That gift to the children was an absolute contingent reversionary gift. The will also contained a proviso, which is the forfeiture clause I have to consider and is as follows: [His Lordship read the clause and continued:] The testator died in 1904 and his widow in 1914, and between those two dates, namely, in 1910, Reginald, one of the sons, was adjudicated a bankrupt, and he has not yet obtained his discharge. Mrs. Newman, a daughter of the testator, in 1909 assigned all the share and interest to which she was then or might thereafter become entitled in his residuary estate by way of mortgage.

The question is, as to Reginald's interest under the will, whether that has passed to his trustee in bankruptcy, or whether the forfeiture clause extends to and operates on that share, and as to Mrs. Newman's share, whether the assignment made by her is effective, or whether the forfeiture clause extends to and operates on her share in the residue.

The language of the will is perfectly clear; but it has been contended that the proviso for cesser of a beneficiary's interest on bankruptcy, or any such act or deed as is mentioned in the clause, is repugnant to what is said to be an absolute gift and is invalid. As to that clause it is said, and truly said, that, on the true construction of it, it applies to every gift made by the will and is not confined to the contingent gifts, nor to those while they are reversionary. And then it is said that, if that is the meaning of the clause, it is repugnant and void altogether—not only as to vested gifts, but also as to contingent gifts.

On the other hand Mr. Pattisson has argued that, although the clause may be repugnant as regards gifts taking effect at once, it is valid as regards contingent gifts where the bankruptcy has occurred, or some act or deed within the clause has been done, while the gift remained contingent. Ought I to accede to this argument?

If the testator had intended that the clause should apply only to contingent gifts, he might easily have said so, but he has not. Mr. Pattisson relied on *Kearsley* v. *Woodcock* (1), *In re Payne* (2),

(1) 3 Hare, 185. (2) 25 Beav. 556.

SARGANT J. 1916 SMITH, *In re.* SMITH *v.* SMITH.

In re Porter (1), and *Churchill* v. *Marks* (2), in which, he says, clauses like the proviso in the present case were held to be valid. But here it is clear, and is not disputed by Mr. Pattisson, that the clause applies to a bankruptcy or alienation at any time in the lifetime of any beneficiary. That being so, the cases cited by him are not in point.

If it is necessary to rely on reported decisions, *In re Jones's Will* (3) is an authority in favour of the view that the forfeiture clause in the will before me is bad for repugnancy. But it is also clearly bad on general principles. The clause applies, in general terms, to bankruptcy and other events occurring at any time, and is not restricted to events occurring in the lifetime of the widow, in which case its effect might have been that there would be no attempt to change ownership after the interest had fallen into possession.

I cannot accept Mr. Pattisson's argument that the Court must have regard to what has actually occurred. In considering whether the clause is repugnant the Court cannot confine itself to what actually happened subsequently but must consider whether as a whole the clause was an attempt to cut down and limit all the gifts throughout. Viewed in this light the clause seems to me clearly repugnant.

I must hold, therefore, that the trustee in bankruptcy takes Reginald Smith's share, and that Mrs. Newman takes her share free from the forfeiture clause, but subject to the mortgage created by her.

Solicitors: *Cole & Jackson; Tarry, Sherlock & King.*

(1) [1892] 3 Ch. 481. (2) 1 Coll. 441.
(3) 23 L. T. 211.

F. E.

In re WELCH.
MITCHELL *v.* WILLDERS.

[1915 W. 2538.]

SARGANT J.
1916
Feb. 16, 17.

Administration—Deficiency of Personalty to pay Testator's Debts—Payment by Sole Executrix out of her own Moneys—Right to be recouped out of Testator's Real Estate—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10.

Testator died in 1885, and by his will appointed his wife E. and W. and H. executors. After certain specific and pecuniary bequests he gave the residue of his personal estate to E., W., and H., upon trust for sale, and, after payment of his debts and funeral and testamentary expenses, to invest the net proceeds and pay the income to E. for life, and after her death to hold the investments and income upon trusts thereinafter declared as to the same. He then devised his real estate unto and to the use of E. for life, and after her death he devised it to W. and H., upon trust for sale, and to hold the net proceeds, and (after E.'s death) the proceeds of the residuary personalty, in trust to pay some annuities, and subject thereto in trust for certain collateral relations. By his first codicil the testator removed W. from the executorship and trusteeship during E.'s lifetime, and by a second codicil he revoked the devise to her for life of so much of his real estate as related to Stainton's Close, which he devised to H. and E., upon trust for sale and to hold the net proceeds upon the trusts declared by the will concerning his residuary personalty. H. having renounced probate and disclaimed the trusts, E. became the sole executrix and trustee, and, as the personalty was insufficient to pay the testator's debts, she paid them out of her own moneys to the extent of 975*l.* As tenant for life she sold part of the realty, but the purchase-moneys were absorbed by payment off of mortgages, and she did not exercise the trust for sale of the other realty, or take any steps to obtain payment of the 975*l.* out of the realty. After her death in 1915 the trustees of the will and the separate trustees of Stainton's Close sold both that property and the other realty, and the trustees of the will raised the question whether E.'s estate was entitled to be recouped the 975*l.* out of the proceeds of sale of the realty, or, alternatively, out of the proceeds of sale of Stainton's Close :—

Held, as to the realty other than Stainton's Close, that even if E. had the right to receive the money as executrix, then, having regard to s. 8 of the Real Property Limitation Act, 1874, she had "the present right to receive" the 975*l.*, and could, in an action for administration of the real estate, have recovered the amount, the persons to pay being all the persons entitled to the real estate; and, as to Stainton's Close, that E. was in no better a position

SARGANT J.

1916

WELCH, *In re.*

MITCHELL *v.* WILLDERS.

than the creditors were before their debts were paid, and their claims would have been barred by s. 10 of the Act; and, therefore, that the claim of E.'s executor was statute-barred.

Burrell v. *Earl of Egremont* (1843) 7 Beav. 205 distinguished.

WILLIAM WELCH, by his will, dated March 19, 1884, appointed one Howard, Alfred Welch, and Emma Welch (testator's wife) his executors and executrix, and, after giving certain pecuniary and specific legacies, bequeathed the residue of his personal estate to the persons so appointed, upon trust for sale, and, after payment of his just debts, including any moneys which he might owe to his wife (and for which she should hold his promissory note of hand or written acknowledgment), and funeral and testamentary expenses, upon trust to invest the net proceeds thereof and pay to or permit his wife to receive the annual income thereof during her life; and from and after her decease he directed that the investments and the future income thereof should be held upon the trusts hereinafter declared concerning the same. The testator then devised all his real estate unto and to the use of his wife and her assigns for her own life, without impeachment of waste, and from and after the determination of her estate he devised the real estate unto and to the use of Howard and Welch, their heirs and assigns, upon trust for sale and to stand possessed of the net proceeds of the sale of the real estate, and (after his wife's death) of the proceeds of his residuary personal estate, upon trust to invest sufficient to produce certain annuities, and, subject thereto, in trust for certain collateral relations.

By a codicil dated February 2, 1885, the testator revoked, during his wife's life, the appointment of Welch as an executor and the bequest and trusts of his residuary personal estate so far as Welch was an object thereof, and directed that during his wife's life his will should be construed as if Welch's name had not been inserted therein as an executor and trustee, but from and after his wife's death he reappointed Welch an executor, and bequeathed his residuary personal estate to him, jointly with Howard, upon the trusts declared by the will. By another codicil, dated March 25, 1885, the testator revoked the devise in his will to his wife of so much of his real estate as related to a parcel of freehold land called Stainton's Close, and devised the said close of land to Howard and

testator's wife, upon trust to sell the same and hold the net profits upon the trusts declared by his will concerning his residuary personal estate; and he confirmed his will and first codicil in all other respects.

The testator died on December 14, 1885, and his will and codicils were proved on February 13, 1886, by his widow alone, power being reserved to A. Welch to come in and prove. Howard renounced probate and disclaimed the trusts.

The widow, being sole executor and trustee, as soon as possible wound up the testator's farming business, but did not sell any of the real estate, except as below mentioned. She kept careful accounts from which it clearly appeared that the personal estate was insufficient to pay the testator's debts, and that, after allowing for 500*l.* due to the widow on the testator's promissory note and for payments made by her to the creditors, there was due to her from the estate a sum of over 975*l.* 7*s.* 11*d.*

In 1886 the widow, as tenant for life, sold two parts of the real estate under the Settled Land Acts, with the consent of certain mortgagees, but the purchase-moneys were exhausted by paying what was due on the mortgages.

The widow died in February, 1915, leaving a will by which she had appointed Thomas C. Willders executor thereof.

After her death the new trustees of the testator's will sold the real estate (other than Stainton's Close), and Stainton's Close was also sold, and the net proceeds of sale in hand were about 5300*l.*, of which about 296*l.* represented the proceeds of sale of Stainton's Close.

The plaintiffs, Thomas J. Mitchell and Arthur W. Tindall (who were the present trustees of the testator's will, so far as his real estate, other than Stainton's Close, was concerned), took out an originating summons against T. C. Willders (the widow's executor), Marie Pauline Welch and Thomas B. Brown (who were the representatives of A. Welch, who was entitled to part of the proceeds of sale of the real estate and of the residuary personalty), and Herbert Welch (who was a person also interested in the testator's real estate and residuary personalty) asking for the determination of the question (amongst others) whether the plaintiffs, as the trustees of the testator's will, might properly pay out of the net

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proceeds of sale of his real estate, or alternatively out of the net proceeds of sale of Stainton's Close, to the defendant T. C. Willders, as the widow's executor, the 975*l.* 7*s.* 11*d.* advanced by the widow and applied by her in or towards payment of the testator's debts and testamentary expenses.

Clayton, K.C., and *J. Norman Daynes*, for the plaintiffs, stated the facts and the questions raised by the summons.

Fairfax Luxmoore, for the defendant Herbert Welch. The widow's claim is statute-barred. As to the proceeds of the real estate other than Stainton's, the case is within s. 8 of the Real Property Limitation Act, 1874, and as to the proceeds of sale of Stainton's Close, it is within s. 10 of the same Act. The personal estate being insufficient to pay the testator's debts, the widow, after paying them, was in no better a position than the creditors had been, but, like them, she had an immediate claim against, first, Stainton's Close, as being realty charged with the payment of debts, and, secondly, against the other real estate: Williams on Executors, 10th ed. p. 1343. No proceedings having been commenced by her for twelve years after her right first accrued, the claims are both barred.

Maugham, K.C., and *G. R. Northcote*, for the widow's executor. The claim is not statute-barred. In a note on s. 40 of 3 & 4 Will. 4, c. 27, in Carson's Real Property Statutes, 1st ed. p. 194, it is stated that "to bring a charge within the operation of this section, there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge." There was no present right in the widow, as executrix, to receive the amount claimed. To bring the case within s. 8 of the Act of 1874 it must be shown that there was some one at once liable to pay and some one else ready to receive the amount payable; and that was not so in the present case. The case is governed by *Burrell* v. *Earl of Egremont.* (1) There a tenant for life paid off a charge on the settled estate, and died in 1837 without having taken any steps in the meantime to keep the charge alive, and there was no part payment or acknowledgment, and Lord Langdale M.R. held that the charge, nevertheless, still existed in favour of his representatives,

(1) 7 Beav. 205.

and had not been defeated by s. 40 of 3 & 4 Will. 4, c. 27. The same case shows that in a case like this the Court will presume that the interest has been kept down. (1) Where the owner of land in fee mortgages the fee and then devises the equity of redemption to A. for life, with remainder to B. for life or absolutely, and dies in possession, and A. enters into possession as tenant for life and afterwards pays off the mortgage and takes a transfer of it to a trustee for himself, the character of his possession is not changed, for he is not turned into a mortgagee in possession. He has the same claim and title against the estate, as regards both principal and interest, as the original mortgagee had, and has also all the rights of a tenant for life of the equity of redemption. And A., while living, or his personal representative after his death, may be entitled to charge the fee, not merely with interest which accrued due before the transfer, but with interest in respect of time during A.'s life after the transfer: *Lord Kensington* v. *Bouverie.* (2) In such a case it could not be sensibly suggested that A. was bound as tenant for life to pay interest to himself as mortgagee in order to keep the statute from running, and in the same way in the present case the widow was not bound to take rents out of one pocket and put it as interest into another pocket. Nor was she bound, if she could, to take proceedings to administer the real estate. If she had claimed a charge on the realty in respect of what she had paid to the testator's creditors, she would have had to obtain judgment before she could have got the charge: *In re Moon.* (3) Enforcing such a charge, while she was tenant for life of the realty, would not have helped her much. The property was at home in the true sense, and any proceedings by the widow would have been hostile to herself. She certainly could not be expected or required to give herself such an acknowledgment as the statute refers to. The requirement of the statute that there must be a person having the present right to receive the money is not satisfied by there being a person who is entitled to bring an action to administer the real estate, even if the widow could have brought such an action: *In re Pardoe.* (4) [They also referred to *Binns* v. *Nichols* (5); *Small* v.

(1) 7 Beav. 236.
(2) (1855) 7 D. M. & G. 134, 144, 145.
(3) [1907] 2 Ch. 304.
(4) [1906] 1 Ch. 265.
(5) (1866) L. R. 2 Eq. 256.

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Wing (1); Williams on Executors, 10th ed. p. 1508; and *Faulkner* v. *Daniel.* (2)]

Fairfax Luxmoore in reply. *Burrell* v. *Earl of Egremont* (3) was a case about a charge, and not about an unsecured debt like this. A person has a "present right to receive," within s. 8 of the Act of 1874, if he is in a position to bring an action: *In re Owen.* (4) In a case like this the Court will not presume payment of interest: *In re England* (5); *In re Allen.* (6)

Owen Thompson, for Marie P. Welch and Thomas B. Brown, who were also interested in the realty and personalty.

SARGANT J. This is a summons raising questions as to the right of an executrix to have repaid to her, out of the proceeds of sale of the testator's real estate, sums which she applied out of her own moneys in payment of debts of the testator. Many authorities have been cited to me during the arguments, but in my view they tended rather to confuse the issues involved in the case than to assist the Court. [His Lordship read the will and codicils, and continued:] The effect of the second codicil was to make Stainton's Close subject to the testator's debts as if it had been part of the residuary personal estate, and to place it, after the widow's death, under the trusts declared by the will in respect of the testator's other real estate. Alfred Welch had by the first codicil been removed from the executorship and trusteeship of the will during the lifetime of the widow, and Howard, the other executor and trustee, having renounced probate and disclaimed the trusts, the widow became the testator's sole trustee and executor. She wound up the testator's farming business as soon as possible, but the only sale of his real estate which she effected was in 1886, when, as tenant for life, she sold two parts of it under the Settled Land Acts. The proceeds of these sales were entirely absorbed in paying off the mortgages on the property then sold. She kept careful accounts, from which it is clear that the testator's personal estate was insufficient to pay his debts, and, after allowing for 500*l.* due to her from the testator on his promissory note and the debts which

(1) (1730) 5 Bro. P. C. 66.
(2) (1843) 3 Hare, 199.
(3) 7 Beav. 205.
(4) [1894] 3 Ch. 220.
(5) [1895] 2 Ch. 820.
(6) [1898] 2 Ch. 499.

she paid, there would appear to have been due to her from the estate a sum of about 975*l.*

The widow lived till 1915, and during her life she did not exercise the trusts for sale, either as to Stainton's Close or the other real estate, nor did she take any steps to recoup herself, out of the real estate, in respect of what she had paid to the testator's creditors. After her death the new trustees of the testator's will sold the remaining real estate, and there is now in hand a considerable sum of money, part of which represents the proceeds of sale of Stainton's Close. The widow's executor now claims to be paid what she paid to the testator's creditors, or, in the alternative, to recover a proportionate part thereof in respect of the proceeds of sale of Stainton's Close.

The questions of law involved turn on ss. 8 and 10 of the Real Property Limitation Act, 1874, and s. 8 is as follows: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." Sect. 10, which I need not read, merely puts the matter in the same position when the money is secured by an express trust.

The first point raised on behalf of the widow's executor, as regards s. 8, is that there was no present right in the widow, as executrix, to receive the amount claimed, and that the section must be read as meaning that there must be some one at once liable to pay and some one else ready to receive the amount payable; and the second point was that the widow was the hand both to pay and to receive.

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I doubt whether the right to receive was in the widow as executrix, or whether, if she had that right, she could have any greater right than that of being subrogated to the rights of the creditors whom she had paid off; but if the right of the executrix is to be regarded, then, looking at the terms of s. 8, hers was the present hand to receive and to give a discharge. That being so, she could then have brought an action for the administration of the testator's real estate, and by proper proceedings could have recovered what was due to her. I have no doubt that she could have taken proceedings which would have been efficacious. She was the tenant for life of the real estate and chose to remain in possession instead of taking administration proceedings. She was the hand to receive, and the hands to pay were all the persons entitled to the real estate in which she herself had a limited interest.

Mr. Maugham has referred me to *Burrell* v. *Earl of Egremont.* (1) There a tenant for life had paid off a charge on the inheritance, and the Court presumed that he had discharged his duty by keeping down the interest on the charge. Almost every element of that case is absent here. In *In re Moon* (2) Warrington J. laid down that the Administration of Estates Act, 1833, which made the real estate of a deceased person assets liable for the payment of his debts, whether on simple contract or specialty, gave no lien or charge on the real estate until judgment had been obtained; and the executrix here had no lien or charge, but only the right, by taking proper proceedings, to obtain payment out of the real estate.

The case is well within the mischief contemplated by s. 8. The widow, being entitled to payment out of the real estate and tenant for life of that estate, abstained for thirty years from taking proceedings, and now her executor claims to have the money repaid. So much for the residuary real estate.

As to Stainton's Close, that was devised on trust for payment of debts. In that case if the original creditors had refrained from taking proceedings for thirty years to have the trust carried out they would have been barred by s. 10. Can there be any difference in favour of the widow, the very trustee who did not sell and pay the debts? In my judgment, as one in the position of an assignee of the debts, she was in no better a position than that of the original

(1) 7 Beav. 205. (2) [1907] 2 Ch. 304.

creditors, and was therefore barred by the two sections of the statute.

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Solicitors for all parties except the defendants M. P. Welch and T. B. Brown: *Oldman, Cornwall & Wood Roberts, for Willders & Son, Holbeach.*

Solicitors for defendants M. P. Welch and T. B. Brown: *Neave, Morton & Co., for Page & Porter, Lincoln.*

F. E.

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[1915 T. 1253.]

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Feb. 10, 12; *March* 1.

Company—Reserve Fund—Tenant for Life and Remainderman—Exchange of Shares for Shares in New Company—Distribution of Reserve Fund by way of Dividend.

The Cambrian, a working colliery company, had accumulated out of profits a large reserve fund invested in the shares of a trust company, which also held shares in three other working colliery companies. In 1913 a combine company was incorporated for the purpose of acquiring the shares in all four working companies, the shareholders in which were offered the opportunity of exchanging their shares for shares in the Combine on advantageous terms, and practically the whole of the shareholders availed themselves of the offer and deposited their shares under a provisional agreement by which provision was made for the deposit in a bank of the share certificates in the four working companies and for the allotment in exchange of shares in the Combine. The annexed scheme set out the rate of exchange in the case of each of the four working companies, and under the heading dealing with the Cambrian added a note that the Cambrian's assets in the Trust Company (referring to the reserve fund) would be distributed among the Cambrian's ordinary shareholders. Immediately after the adoption of the provisional agreement the directors of the Trust Company exchanged all shares held by that company in the three other working companies for shares in the Combine, and subsequently went into liquidation. Other steps were taken, and a resolution was passed by the Cambrian for the distribution of the assets to be received by the Cambrian in the liquidation of the Trust Company, representing the reserve fund, by way of dividend amongst their ordinary shareholders. As the

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result of these transactions the shares in the Combine thus acquired by the Cambrian and some cash were distributed among their ordinary shareholders. On a summons taken out by trustees raising the question whether the shares and cash so distributed to them ought as between tenant for life and remaindermen to be treated as capital or income :—

Held, that the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend and not by way of reduction of capital ; that, looking at the real transaction, there was no intention to capitalize the reserve fund ; and that the shares and cash in the hands of the trustees must be treated as income and not as capital.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment :—

" This summons raises questions in relation to the trusts of two instruments—namely, first, a settlement dated July 26, 1882, and executed on the marriage of the late Samuel Moreton Thomas and the defendant, Mary Hamilton Thomas, and, secondly, the will dated April 3, 1910, of the said Samuel Moreton Thomas. The question in each case is the same, and is whether the whole or any and what part of certain shares and cash which are in the hands of the trustees of the instrument in connection with their former holding of shares in the Cambrian Collieries, Limited (hereinafter called the Cambrian Company), ought to be held by them as capital, or should be treated as income and paid to the defendant Mary Hamilton Thomas. At the time of the transactions hereinafter mentioned there were 2255 ordinary shares in the Cambrian Company held on the trusts of the marriage settlement, and the defendant Mary Hamilton Thomas was, as she still is, beneficially entitled to the income of these trust funds. At the same period there were 20,620 ordinary shares in the Cambrian Company held on the trusts of the will, and the defendant Mary Hamilton Thomas was, as she still is, entitled as to one half of these trust funds to an absolute beneficial interest, and as to the other half of such funds to the income thereof during her life.

" The Cambrian Company is a very prosperous concern, and had by the month of January, 1913, accumulated a large reserve fund which was invested in the shares of a company known as the Cambrian Trust Company, and hereinafter called the Trust Company,

and indeed comprised the whole of these shares. The Trust Company, as its name implies, was not itself a working company, but held shares in other companies, namely, the Glamorgan Coal Company, Limited, the Naval Colliery Company (1897), Limited, and the Britannic Merthyr Coal Company, Limited. These last named three companies (hereinafter sometimes referred to as the Glamorgan, the Naval, and the Britannic Companies respectively) owned pits adjoining the properties of the Cambrian Company, and they and the Cambrian Company are hereinafter sometimes referred to as the four working companies.

" In March, 1913, a company known as the Consolidated Cambrian, Limited, and hereinafter called the Combine, was incorporated with a share capital of 2,000,000*l.* for the purpose of acquiring the shares in the four working companies. The shareholders in the four working companies were offered the opportunity on advantageous terms of exchanging their shares for shares in the Combine, and practically the whole of these shareholders, including the trustees of the settlement and will now in question, availed themselves of the terms of exchange offered, and for that purpose deposited their shares under a provisional agreement dated March 19, 1913, next hereinafter stated. By that agreement, which was expressed to be made between the Combine of the first part, such registered holders of the shares of the four working companies as should deposit their share certificates as therein provided (therein and hereinafter called the depositing shareholders) of the second part, and the National Provincial Bank of England (therein and hereinafter called the bank) of the third part, provision was made for the deposit by the depositing shareholders with the bank of share certificates in the four working companies respectively, and for the transfer of the shares represented thereby to the Combine, and for the allotment to the depositing shareholders by the Combine of the shares in the Combine constituting, under an amended scheme, the consideration for the transfer of their shares in the four working companies. The scheme so annexed was expressly made dependent on a defined proportion of the holders of each class of shares in the four working companies making the exchange in question, and it set out most particularly under four different headings representing each of the four working companies the rate at which the shares in each of those companies were to be

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exchanged for shares in the Combine. Under the heading dealing with the shares of the Cambrian Company this very important note appeared, namely: 'Note.—Cambrian Collieries' assets in Cambrian Trust will be distributed among Cambrian ordinary shareholders.' No corresponding note, and indeed no note of any kind, appeared under the headings dealing with the shares of the Glamorgan Company, the Naval Company, and the Britannic Company.

"A great deal of discussion has taken place with regard to the meaning and effect of this note, but I do not think that there is any real doubt on this point. Its object undoubtedly was to determine the rights as between the depositing shareholders in the four working companies. Their proper proportion inter se of the shares of the Combine obviously depended on the relative value of the assets of the four working companies, and a proper valuation had no doubt been made for that purpose, which had obviously excluded the value of the reserve fund of the Cambrian Company, which itself depended indirectly on the values of the assets of the rest of the four working companies. Had there been no such note as that in question the transfer of the shares in the Cambrian Company would obviously have included a transfer of rights in the reserve fund of the Cambrian Company, which had been excluded from the valuation of their assets. And accordingly the note was inserted to make it clear that these rights were to be excluded from the transfer, and that the reserve fund of the Cambrian Company was to be distributed amongst the shareholders—not merely the depositing shareholders—of that company so far as they held ordinary shares. There were two ordinary ways in which such a distribution could be made—namely, first, a distribution of the fund as undivided profits and by way of dividend, and, secondly, a distribution of the fund by way of return of capital in excess of the requirements of the Cambrian Company. The first was the obvious and easy way, and would leave the prima facie claim of the shareholders in the Cambrian Company to have the fund distributed by way of dividend unaffected. The second would involve the ordinary steps, including the sanction of the Court, incidental to a formal reduction of capital, and might also result in the Combine ultimately receiving on transfer ordinary shares in the Cambrian Company of a less nominal amount than that at which they stood at the date of the scheme. In my opinion the

terms of the note and the scheme generally pointed to an intention to adopt the first of these two methods of distribution. Indeed, otherwise it would have been made subject to the approval by the Court of the proposed reduction of capital.

" The provisional agreement subsequently became binding on the parties thereto (including the registered shareholders in the four working companies who had deposited their share certificates with the bank) on or about April 22, 1913. No complaint is made of the conduct of the trustees of either the settlement or the will in so depositing their share certificates, and I am satisfied that they exercised a wise discretion in so doing.

" Immediately after the adoption of the provisional agreement the directors of the Trust Company (who were also the directors of the Cambrian Company) exchanged all shares held by the Trust Company in the Glamorgan, Naval, and Britannic Companies for a right to an allotment of the appropriate number of ordinary and preference shares in the Combine, and subsequently the Trust Company went into liquidation by special resolution passed on September 26, 1913, and confirmed on October 11, 1913.

" Various other steps were taken for the purpose of carrying out and giving effect to the aforesaid provisional agreement and scheme. These steps do not appear to me really to affect the position constituted by the scheme, but it may be well to state them substantially as they appear in paragraphs 16, 17, 19, 20, 21, and 22 of the affidavit of the plaintiff John Howard Thomas. Paragraph 16 is: ' By an indenture . . . . dated April 12, 1913, and made between the Combine of the first part, such registered holders of ordinary shares in the Collieries Company '—meaning the company which I have called the Cambrian Company—' as had deposited or should thereafter deposit their share certificates in accordance with the provisions of the said agreement of March 19, 1913, of the second part, and the above mentioned bank of the third part (after reciting (inter alia) the said agreement '—that is, the provisional agreement —' and that it was one of the terms therein that certain assets of the Collieries Company (being those represented by shares of that company in the Trust Company) should be distributed among the then holders of ordinary shares in the Collieries Company and that such assets included 120,000 shares in the Trust Company the whole

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of which represented accumulated profits, and after reciting that it was proposed to give effect to the terms of the said agreement by the Collieries Company declaring out of its accumulated profits a dividend distributable among the holders of ordinary shares in the Collieries Company and payable either in cash or specie of an amount equal to the value of the said shares held by the Collieries Company in the Trust Company or the surplus assets of the Trust Company remaining after payment of its debts and liabilities and the costs of its liquidation; and after reciting that such dividend might not have been declared or paid before the said exchange of shares between the Cambrian depositing shareholders and the Combine should have been effected) it was witnessed that the Combine thereby acknowledged and declared that if and to the extent that any dividend should after the making of the exchange of shares referred to in the said agreement of March 19, 1913, be declared or paid by the Collieries Company out or in respect of the profits of such company then represented by the shares held by it in the Trust Company or out or in respect of the amounts receivable by the Collieries Company in the liquidation of the Trust Company, the Combine should not be entitled as holder of the said exchanged shares or any of them to participate in such dividend, but the same should belong to the persons respectively who were the holders of the shares in the Collieries Company immediately before the making of the said exchange.' Then paragraph 17: 'A circular letter dated April 22, 1913, was issued by the Collieries Company stating that the scheme referred to had been declared binding by he Combine and that a supplementary deed (being the said deed dated April 12, 1913) had been executed. In accordance with such scheme the trustees of the said settlement on April 2, 1913, and the trustees of the said will on April 28, 1913, deposited the whole of the shares in the Collieries Company held by them respectively. The transfers of such shares executed by the respective trustees were received by the Combine as to those subject to the said settlement on June 13, 1913, and as to those subject to the will on May 17, 1913, and the Combine was registered as shareholders in the Collieries Company in respect of both sets of shares.' Then paragraph 19 says: 'At an extraordinary general meeting of the Collieries Company held on December 15, 1913, the following

resolution was duly proposed and seconded and carried unanimously : "That in pursuance of the agreement dated April 12, 1913, and made between Consolidated Cambrian, Limited, of the first part, such registered holders of ordinary shares of and in this company as had deposited or thereafter should deposit their share certificates in respect of the said ordinary shares in accordance with the provisions of an agreement dated March 19, 1913, of the second part, and the National Provincial Bank of England, Limited, of the third part, the whole of the moneys and specific assets received or to be received by this company or to which this company is entitled in the liquidation of the Cambrian Trust, Limited, consisting of" '— and then the amounts of the shares are mentioned—' " or the right to an allotment thereof and of a certain amount in cash (such moneys or specific assets representing certain investments of profits made by this company and profits on such investments) be distributed by way of dividend among the persons entitled thereto by virtue of the said agreement and in manner provided thereby ; and that in so far as such assets consist of the right to an allotment of fully paid shares in Consolidated Cambrian, Limited, such distribution be effected by this company requesting the liquidator of the Cambrian Trust, Limited, to procure the allotment of such shares to be made direct to the persons entitled thereto by virtue of the said agreement, and that the directors be and they are hereby authorised to take all necessary steps and to execute all necessary documents for carrying this resolution into effect." ' Paragraph 20 is : ' At a meeting of the directors of the Collieries Company held on December 15, 1913, the following resolution was duly passed : " That in pursuance of the resolution of the shareholders passed at the extraordinary general meeting of the company held this day the liquidator of the Cambrian Trust, Limited, be requested and authorised to procure the allotment of the shares in Consolidated Cambrian, Limited, forming part of the dividend declared at the said meeting to be made in accordance with the list produced at this meeting and for the purpose of identification signed by the chairman of this company." ' Then paragraph 21 is : ' In due course, namely, on December 22, 1913, the shares thus acquired by the Collieries Company in the Combine were distributed as aforesaid amongst the ordinary shareholders of the Collieries Company in specie in the following

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proportions, namely '—and then the proportions are given. Then: 'At the same time there was a cash distribution of ninepence halfpenny per share amongst such shareholders. These distributions were in addition to and at a different time from the usual half-yearly dividends which were duly paid at the usual rates.' Then paragraph 22 is: 'In the case of limited beneficial owners where authority had been given to them to receive the dividends the Collieries Company paid the usual dividends accordingly, but in the matter of the new shares so distributed as aforesaid the company did not issue them under such authorities but in the names of, and paid the balance of cash to, the persons in whose names the ordinary shares actually stood.'

"By virtue of these transactions there have now been received by the trustees of the settlement and will in question in respect of their proportion of the distribution of the reserve fund of the Cambrian Company the following shares and moneys—namely, by the trustees of the settlement 1691 ordinary shares of 1*l.* each and 2255 six per cent. cumulative preference shares of 1*l.* each in the Combine and 89*l.* 5*s.* 3*d.* cash, and by the trustees of the will 7655 ordinary shares of 1*l.* each and 10,207 six per cent. cumulative preference shares of 1*l.* each in the combine and 404*l.* 0*s.* 6*d.* cash. And the question now arises whether the whole of the benefits so received by the trustees of the settlement and a moiety of the benefits so received by the trustees of the will ought to be retained by them as capital, or ought to be paid to the defendant Mary Hamilton Thomas as income. The other moiety of the benefits so received by the trustees of the will of course belongs to Mrs. Thomas, inasmuch as she is entitled to a moiety of the corpus of the residue under the will."

J. M. Gover, for the plaintiffs.

Jessel, K.C., and *F. Baden Fuller*, for parties entitled in remainder. *Bouch* v. *Sproule* (1) and similar cases do not really touch the present case. The nearest case to the present is *In re Armitage* (2), where it was held that the tenant for life being entitled only to receive dividends and bonuses in the shape of dividends was not entitled to an excess sum paid for the testator's shares on a recon-

(1) (1887) 12 App. Cas. 385. (2) [1893] 3 Ch. 337.

struction of the company. The transaction in the present case, notwithstanding the resolution, really amounted to a reconstruction of the Cambrian Company and a division of its assets as capital. The scheme was that persons who got shares in the Combine company, representing part of what they held before the reconstruction, were to get for the remaining part new shares to be distributed among them; but it was throughout an exchange of capital assets for capital assets. There is no magic in the word "dividend." The trustees could not alter rights by concurring in the scheme. The shares representing reserve fund were to be capitalized, and not distributed as a bonus dividend, and ought to be treated as capital in the hands of the trustees: *In re Evans* (1); *In re Carson* (2); *Irving* v. *Houstoun.* (3)

[SARGANT J. referred to *In re Malam.* (4)]

Maugham, K.C., and *T. H. Attwater*, for the tenant for life. The questions in this case are, first, whether a dividend has been declared consisting of the reserve fund shares, and, secondly, in what character and by what right did the trustees receive the shares. There is nothing to show an intention to capitalize the reserve fund shares; all the documents are opposed to such a view of the transaction, and the trustees did not receive the shares as vendors. There is no act of the trustees converting income into capital, nor can trustees effect such a conversion. The trustees came into the scheme on the terms that the reserve fund was to be distributed as dividend. The fact that they have ceased to be shareholders in the Cambrian Company does not affect the question. The general principle applicable to the case is that stated by Fry L.J. in delivering the judgment of the Court of Appeal in *Bouch* v. *Sproule* (5) and quoted with approval by Lord Herschell in the House of Lords (6): "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently

(1) [1913] 1 Ch. 23.
(2) [1915] 1 I. R. 321.
(3) (1803) 4 Pat. Sc. App. 521.
(4) [1894] 3 Ch. 578.
(5) (1885) 29 Ch. D. 635, 653.
(6) 12 App. Cas. 397.

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what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital."

Cur. adv. vult.

March 1. SARGANT J. delivered a written judgment in which, after stating the facts as above set out, he continued: Counsel on both sides have called my attention to *Bouch* v. *Sproule* (1) and one or two other cases of the same kind; but they are agreed that those cases are really of little, if any, assistance here, since in all of them the arrangement was of a very different character involving an alteration of the capital of the very company the shares in which formed part of the trust, while here no capital alteration of that kind has occurred. On the other hand counsel are agreed, and I think properly agreed, that the real governing principles are those laid down in *In re Armitage* (2), and that the Court must inquire whether the benefits in question are really, and not merely nominally, received in respect of a division of dividend or are really received as and by way of a distribution of capital. Mr. Jessel in his argument for the remaindermen put it—and I was careful to take down the terms of his propositions as accurately as possible—that the true transaction was a reconstruction of the Cambrian Company and a division of its assets as capital; that shareholders gave up their shares in the Cambrian Company for shares in the Combine, and as part of the same transaction received assets no longer wanted for working purposes, and that by the terms of the contract the Combine was not to have these assets, but they were to go to the ordinary shareholders; that the whole thing was the exchange of capital assets for capital assets; and that the shareholders who got the shares in the Combine representing their holdings in the assets of the Cambrian Company other than the reserve fund were to get as part of the bargain, and therefore also as capital, the shares in the Combine representing the reserve fund.

There is a certain general speciousness in this argument, but I do not think that it withstands a careful and accurate examination.

(1) 29 Ch. D. 635; 12 App. Cas. 385. (2) [1893] 3 Ch. 337.

In the first place I cannot find that there was anything approaching a reconstruction of the Cambrian Company. It and the rest of the four working companies are unaffected except as regards a change in their shareholders. In the next place, there is no reason to think that the reserve fund of the Cambrian Company was ever used as working capital, and certainly none for supposing that the acquisition by the Combine of the shares of the Cambrian Company provided any working capital for the Cambrian Company, or altered its position in that respect at all. The Combine merely took as shareholder the shares in each of the four working companies and thereby secured a union of ultimate beneficial interest; the scheme, as I understand it, had nothing to do with bringing in any fresh capital to any of the four working companies. But a still stronger, and to my mind complete, answer to Mr. Jessel's argument is that put forward by Mr. Maugham, namely, that to capitalize this reserve fund, representing undivided profits, or the trustees' shares thereof, you must find an intention to do so on the part either of the Cambrian Company or on the part of the trustees, and that no such intention can be found.

So far as the Cambrian Company is concerned, both the terms of the note in the scheme to which I have referred already and the terms of their resolution seem to me to point quite clearly to an intention to distribute these hitherto uncapitalized profits as and by way of dividend. And I can find no reason in principle against a company selling its main assets for a capital consideration but reserving a part of its assets representing profits for the purpose of declaring a dividend thereout; indeed, this is very commonly done as regards accruing dividend when a company reconstructs or sells in some other way to another company towards the end of the selling company's financial year.

And again, so far as the trustees of either instrument are concerned, I can find nothing to suggest that they agreed or desired to turn into capital what they received as dividend, or to otherwise affect its character. True they were to receive the distribution in question as well as the shares in the Combine which came to them in respect of the direct exchange of shares in the Cambrian Company for shares in the Combine. But this was obviously because they were the persons in whose names the shares in the Cambrian Company actually stood,

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and cannot affect any question as between the successive beneficiaries for whom they held. If the trustees of either instrument had been unwise enough not to come into the scheme, it seems to me indisputable that while continuing to retain their original holdings of shares in the Cambrian Company they would have received, entirely independent of any change in the capital held by them and as and by way of a distribution of dividend pure and simple, the very shares with regard to which the question now arises. And, this being so, I cannot think that the fact that they have made a beneficial exchange increasing the value of their capital holding can have the effect of causing an additional capitalization of what would otherwise have been a distribution by way of dividend.

Accordingly I propose to declare that all the shares and cash mentioned in head 1 of the summons and also all those mentioned in head 2 thereof ought to be treated as income and transferred and paid, subject to costs, to the defendant Mary Hamilton Thomas. The costs had better come rateably out of the sums of 89*l.* 5*s.* 3*d.* and 404*l.* 0*s.* 6*d.* forming the cash distribution.

Solicitors: *Torr & Co., for Roberts & Andrew, Exeter; Newton G. Driver.*

A. C.

YOUNGER J.
1916
Jan. 26, 27, 31.

In re PALMER.
PALMER *v.* PALMER.

[1915 P. 2024.]

Will—Construction—Estate Duty—Settled Legacy—"Free of all duties"—Annual Sum out of Income of Residue—New Duty imposed after Death of Testator—Incidence of Duties—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

Testator, by will made in 1910, bequeathed to trustees the sum of 25,000*l.* upon trust during the life of his wife to pay the income to the person who would for the time being be entitled as tenant for life or tenant in tail to the rents of his settled hereditaments if his wife were then dead, and after the death of his wife directed the said sum to fall into his residue; and directed that all legacies thereinbefore given or which might be given by any codicil should be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees; and the testator thereby devised his settled hereditaments to his trustees upon trusts in favour of his wife during her life, and after her death devised the settled hereditaments to the use of his nephew A. for life, with remainder (in the events which happened) to his nephew B. for life, with remainder to the use of B.'s children in strict settlement; and the testator thereby gave his residuary real and personal estate to his trustees upon trust for sale and conversion, and upon trust out of the moneys so to arise to pay his funeral and testamentary expenses and legacies and to make provision for the payment of all duties on any bequests thereinbefore made free from duties or deductions for duties, and to invest the residue upon trust out of the income thereof to pay an annual sum of 3000*l.* to the person who would be so entitled as tenant for life or in tail as aforesaid, and to hold the surplus income upon the trusts therein mentioned.

The testator died in 1913. A. died a bachelor in 1915. On a summons raising the question how as between the beneficiaries under the will the estate duty payable on A.'s death imposed since the testator's death by virtue of the Finance Act, 1914, s. 14, ought to be borne:—

Held, that the estate duty payable in respect of the settled legacy of 25,000*l.* must be borne by the residuary estate, but that the estate duty on the notional sum required to produce the annual sum of 3000*l.* must be borne by that sum.

In re Parker-Jervis [1898] 2 Ch. 643 followed.

In re Snape [1915] 2 Ch. 179 distinguished.

ADJOURNED SUMMONS.

By his will, dated October 14, 1910, George William Palmer

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appointed the plaintiffs and the defendants, Eustace Exall Palmer and Alfred Palmer, to be his executors and trustees, and after bequeathing certain specific and pecuniary legacies (by clause 11) bequeathed to his trustees the sum of 25,000*l.* upon trust for investment, and during the life of his wife, the plaintiff Eleanor Barrett Palmer, to pay the income of the invested fund to the person who, under the limitations of the settled hereditaments thereinafter contained, would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of his Berkshire estates (therein described as the "settled hereditaments") if his said wife were then dead; and after the death of his said wife he directed that such fund should fall into and form part of the settled residue (thereinafter defined) and so as to form one fund therewith for all purposes, but not so as to increase or multiply charges or powers of charging; and (by clause 12) after bequeathing an amount of 12,000*l.* to his said wife during her life, with power for his trustees to appropriate part of his estate to provide for the payment thereof, the testator (by clause 13) declared that "all legacies annuities and bequests whatsoever hereinbefore given or made, and all legacies annuities and bequests which may be given or made by any codicil hereto shall be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees or annuitants entitled thereto respectively under the preceding clauses of my said will"; and after making certain specific devises the testator (by clause 16) devised his settled hereditaments to his trustees during the life of his said wife upon trust to permit her during her life to have the use and enjoyment or to receive the rents and profits of all or any part thereof, so far as she elected to do so in manner therein mentioned, and on certain conditions therein expressed; and subject as aforesaid upon trust to enter on and manage such estates with the powers therein mentioned, and to pay and apply the net rents and profits in the manner in which the income arising from the settled residue was thereinafter directed to be paid and applied and so as to form one fund with such last-mentioned income, but not so as to increase or multiply charges or powers of charging; and after the death of his said wife the testator (by clause 17) devised his settled hereditaments to the use

of his nephew the late Ronald William Palmer (then and therein described as Ronald William Paulton) for life, with remainders in favour of his issue in tail, with remainder to the use of his nephew the defendant Eustace Exall Palmer for life, with remainder to the use of all or such one or more exclusively of the others or other of his children or remoter issue as he should by deed or will appoint, and in default of appointment to the use of his first and every other son successively according to seniority in tail male, with remainder to the use of his first and every other daughter successively according to seniority in tail male, with similar remainders in tail general, with remainder to the use of the testator's own right heirs, subject to an usual provision cutting down the estates of tenants in tail born in the testator's lifetime to estates for life, with remainders to their issue in tail. And the testator (by clause 22) devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion as therein mentioned, but with power of postponement, and upon trust out of the moneys so to arise or forming part of his residue to " pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and make provision for the said annuity of 12,000*l.* and also make provision for the payment of all duties on any devises and bequests hereinbefore made free from duties or deductions for duties," and to hold the residue of the said moneys upon trust for investment, and as to the invested fund (thereinafter called the settled residue) upon trust during the period of accumulation (meaning by such expression the period commencing from his death and terminating at the expiration of twenty-one years from his death or at the previous death of his said wife, or at such earlier date as she should by deed appoint) out of the income of the settled residue to pay " an annual sum of 3000*l.*" to the person who under the limitations of the settled hereditaments thereinbefore contained would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of the settled hereditaments if his said wife were then dead, and to accumulate the surplus income of the settled residue, and from and after the determination of the period of accumulation, if his said wife should then be living, upon trust to pay the whole income

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of the settled residue and of the accumulations thereof during the residue of her life to such person as aforesaid (as in the case of the said annual sum of 3000*l.*), and after her death upon trust to hold the settled residue and the accumulations thereof upon trust in the first place to raise thereout three several sums of 30,000*l.* each clear of all deductions whatsoever for the benefit of his sisters as therein mentioned, and subject as last aforesaid upon trust to pay and apply the same as capital as thereinafter mentioned, namely, in the purchase of freehold hereditaments to be settled in the same way as the settled hereditaments.

The testator died on October 8, 1913. His widow elected to take a life estate in part only of the settled hereditaments.

Ronald William Palmer died a bachelor on May 4, 1915.

Eustace Exall Palmer had two sons and a daughter, all of whom were living at the testator's death. He had not yet exercised the power of appointment reserved to him by the will.

This was an originating summons raising the question how as between the beneficiaries under the will the estate duty imposed since the testator's death by virtue of s. 14 of the Finance Act, 1914, on the death of Ronald William Palmer in respect of the settled legacy of 25,000*l.* and of the notional sum necessary to produce the annual sum of 3000*l.* ought to be borne.

J. E. Harman, for the summons.

W. E. Tyldesley Jones, for Eustace Exall Palmer. The estate duty in respect of both sums should be borne by the residue. As regards the settled legacy, the obvious intention of the testator was to provide a clear income sufficient during the life of the widow to maintain the person entitled in remainder in a manner suitable to his expectations. If the legacy is to be reduced by the amount of duty payable on the death of each such person during the life of the widow, that intention will be pro tanto defeated. The question of construction is not affected by the fact that the widow has elected to take part only of the settled hereditaments. Clause 13 is directly applicable to this legacy and applies notwithstanding that the estate duty was imposed after the testator's death by virtue of s. 14 of the Finance Act, 1914, which takes away the

exemption previously existing. It is true that in *In re Snape* (1) Eve J. held that on the construction of the particular will before him the words "free of all duty" must be confined to duties existing at the date of the testator's death, being largely influenced by the inconvenience which would otherwise result if the general estate had to be retained to answer the possible new duties. That inconvenience does not exist in the present case, in which the settled legacy ultimately falls back into the residuary estate. The true question is correctly stated by Kekewich J. in *In re Parker-Jervis* (2) to be whether the settlor or testator contemplates, not that any particular duty shall or shall not be paid, but whether the annuity shall be paid without any deductions whatever. The cases of *Jones* v. *Ogle* (3), under the Apportionment Act, 1870, *In re Bridger* (4), under the Mortmain Act, 1891, and *In re March* (5), under the Married Women's Property Act, 1882, do not support Eve J.'s conclusion in *In re Snape.* (1) The effect of a later Act may affect the interpretation as well as enlarge the operation of a will.

As regards the annual sum of 3000*l.*, this stands on a slightly different footing. As between the Crown and the taxpayer a notional capital sum sufficient to produce the annual sum of 3000*l.* is deemed to pass on the death for the purpose of the computation of duty, and that notional sum must as between the beneficiaries be kept intact so as not to reduce the annual sum of 3000*l.*, which is a preferential payment out of the income of the residuary estate. [He referred to *In re Rayer.* (6)]

H. B. Vaisey, for the children of Eustace Exall Palmer, supported the same arguments.

A. B. Nutter, for Alfred Palmer as representing the inheritance of the lands directed to be purchased out of the residuary estate. The estate duty in each case must be borne by the particular funds. As regards the settled legacy of 25,000*l.*, there is no real distinction between the present case and *In re Snape* (1), and the decision of Eve J. is directly in point, being based on the general ground

(1) [1915] 2 Ch. 179.
(2) [1898] 2 Ch. 643.
(3) (1872) L. R. 14 Eq. 419; L. R. 8 Ch. 192.
(4) [1894] 1 Ch. 297.
(5) (1884) 27 Ch. D. 166.
(6) [1903] 1 Ch. 685.

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that the operation of such a direction as is contained in clause 13 of the present will must be determined with reference to the duties existing at the testator's death and not to duties subsequently imposed. The expression in clause 13 "free of all duties and deductions in respect of duties (other than income tax)" is no fuller than that in *In re Snape* (1), "free of all duty," which is the most comprehensive form of words that can be suggested. The will under construction is in no sense special, the provisions proceeding on ordinary lines. The cases referred to in the argument before Eve J., particularly in the light of the judgment of Davey L.J. in *In re Bridger* (2), clearly support that judge's decision. The observations of Kekewich J. in *In re Parker-Jervis* (3) referred to a contract and are not applicable to the language of wills. The question of convenience is one of principle and is not affected by the trusts of the particular will.

With regard to the annual sum of 3000*l.*, this is an entirely new point which is not covered by any direct authority. The estate duty must be borne by the annual sum, falling within the provisions of s. 2, sub-s. 1 (*b*), s. 7, sub-s. 7 (*b*), and s. 9, sub-s. 1, of the Finance Act, 1894. The amount of the estate duty is arrived at by the creation of a notional sum or "slice" sufficient out of the income to answer the annual sum (see Austen-Cartmell's Finance Acts, 5th ed. pp. 136 and 157) and must be borne by that notional sum or "slice" so as in effect to reduce the amount of the annual sum: *Berry* v. *Gaukroger* (4); *In re Parker-Jervis.* (3) It is not necessary to rely on s. 14 of the Finance Act, 1894; but if that section is relied on the annual sum is "a sum charged" within the provisions of that section: *In re Countess of Orford.* (5) The case of *In re Rayer* (6) is not a satisfactory authority on this point. Presumably that case must have been decided under s. 14 of the Finance Act, 1894, and not under s. 9; or, as the trusts of realty and personalty were the same, the result may possibly have been arrived at by arrangement between the parties. [*In re Spencer Cooper* (7) and *In re Palmer* (8) were also cited.]

(1) [1915] 2 Ch. 179.
(2) [1894] 1 Ch. 297.
(3) [1898] 2 Ch. 643.
(4) [1903] 2 Ch. 116.
(5) [1896] 1 Ch. 257.
(6) [1903] 1 Ch. 685.
(7) [1908] 1 Ch. 130.
(8) (1912) 106 L. T. 319.

YOUNGER J. The question raised by this summons is how as between the beneficiaries under the will of the testator the estate duty ought to be borne which became payable in respect of the passing of (*a*) the settled legacy of 25,000*l.* and (*b*) the annual sum of 3000*l.* or the notional sum required to produce the same, on the death on May 4, 1915, of Ronald William Palmer, who until he died was the person entitled to the income of the settled legacy and to the annual sum.

The testator was a gentleman of very large fortune who by his will settled his Berkshire estates upon his wife for her life, with remainder to his nephew Ronald William Palmer and his issue, with remainder to other nephews of the testator and their respective issue in strict settlement. For the immediate wants of the future owner of these Berkshire estates the testator provided two funds—(1.) a settled legacy of 25,000*l.* and (2.) an annuity of 3000*l.* payable out of the income of his residuary estate. Subject to payments which he directed to be made out of that residuary estate the testator directed it to be accumulated for twenty-one years or during the life of his widow, or until she should determine the period of accumulation, as she was empowered to do, and he directed, putting it generally, that the accumulated residue was to be treated after the period of accumulation had come to an end as capital moneys arising from the sale of his Berkshire estates.

By clause 11 of his will the testator bequeathed the settled legacy of 25,000*l.* in the following terms. [His Lordship read the clause and continued:] By clause 13 of his will the testator declared as follows. [His Lordship read the clause and continued:] The scheme of the will so far is quite clear. The testator provided what appeared to him to be a suitable subsistence allowance fitting the future condition of those whom he had selected to enjoy his Berkshire estates. The allowance was to be borne by a fund the capital of which was ultimately destined by the testator to go in the same way as the estates. I do not doubt that the testator intended that the fund should remain intact to be enjoyed by each of the persons entitled to it in succession, but the question is whether new duties imposed for the first time by recent legislation are to be borne by the ultimate residue or whether they are to be paid out of the subsistence fund. One would expect that the testator would

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intend to throw these duties upon his residue, but the question of course is whether upon the true construction of his will he has in fact done so.

The duty in question is the estate duty now for the first time imposed in a case like the present by s. 14 of the Finance Act, 1914, which became law after the death of the testator; and the question as to the incidence of that duty upon the settled legacy of 25,000*l.* is whether upon its true construction it can be included in the duties which by clause 13 of his will the testator directed to be paid in effect out of the residue of his estate. In looking at clause 13 as it stands, there are certain conclusions which are reasonably clear; for instance, it is certain that under this clause all legacy duty was directed to be paid irrespective altogether of its amount. It was not merely such legacy duty as existed at the testator's death, but any legacy duty which might thereafter be imposed, whatever the amount might be. Further, in clause 11 the testator plainly contemplated that the 25,000*l.* as a fund would remain intact and would not be subject to deduction or diminution. In these circumstances the question is whether there is such an essential distinction between the amount of legacy duty which by virtue of subsequent legislation may amount to any percentage and which is to be paid out of the residue and this estate duty which was imposed by Act of Parliament after the death of the testator as to lead one necessarily to the conclusion that, although the legacy duty is to be paid out of residue, the estate duty is not to be so paid.

The case of *In re Parker-Jervis* (1), in which a very similar question was raised before Kekewich J. upon the construction of a settlement, is in my opinion very much in point. The settlement there was dated in 1861, long before the passing of the Finance Act, 1894, and the question was whether upon the true construction of that settlement the parties had by agreement provided that the estate duty should be borne in a particular way. Kekewich J. refers to the question which was raised before him as follows: "It was urged that this was a settlement made in the year 1861, and it was impossible that the contracting parties should have contemplated such a charge as estate duty, which was imposed more than thirty years afterwards. It is a sufficient answer to that to say

(1) [1898] 2 Ch. 643, 653.

that the parties did not contemplate that or any other duty. What they did contemplate was that the annuity should be paid without any deductions whatever." Now, applying that principle of construction to the will before me, I arrive at the conclusion that what was present to the testator's mind was not that this or that duty should be paid out of the residue of his estate so as to leave the 25,000*l.* intact, but that his intention and directions were that any and every duty should be so paid in order that the paramount object which he had in view, namely, that the 25,000*l.* should be kept intact, might be achieved.

My attention, however, has been called to the decision of Eve J. in *In re Snape* (1), where in construing the words " free of all duty " he came to the conclusion that in that will the expression " free of all duty " meant free of all duty chargeable thereon by law as it stood at the testator's death. If I thought that Eve J. in that case intended to lay down that it was not possible for a testator to provide in advance for such a duty as this, I should of course follow his decision. But as I read his judgment it turned upon the particular will in that case. He had not the assistance of the surrounding circumstances which I have in the present will to lead me to the conclusion at which I have arrived, and accordingly I do not think that I am in any way differing from the view expressed by Eve J. in holding that the estate duty in respect of this 25,000*l.* legacy should be borne by the residue of the testator's estate.

The question with regard to the 3000*l.* annuity is different. That gift is to be found in clause 22 of the will, and it is contained in the trusts concerning the testator's residuary estate, where he directs that his trustees " shall out of the income of the settled residue pay an annual sum of 3000*l.*" to the person who under the limitations of the settled hereditaments would for the time being and from time to time be entitled thereto as tenant for life or tenant in tail if his wife were then dead. The question is whether with regard to that 3000*l.* also on the true construction of this clause and of the will as a whole the present annuitant is entitled to have the estate duty discharged out of the ultimate residue of the estate. Though I feel little doubt as to the answer which the testator himself would have given to the question if it had been put to him, as

(1) [1915] 2 Ch. 179.

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a mere matter of construction I cannot come to the conclusion that he has succeeded in advance in exempting this 3000*l.* from the charge of this duty. It is in substance, I think, a reversionary annuity charged upon the income of the residue, and I can find in the will no ground for the exemption claimed. The annuity is not even given free of legacy duty, so that it is not a free sum even so far as duties existing at the testator's death are concerned. It is not either expressly or by any necessary implication given free from deductions or with any similar words of exoneration. As a matter of construction therefore I must hold that the annuity must bear the duty to be assessed under the Act of 1914 on the principle set forth in *In re Parker-Jervis.* (1)

Solicitors: *Waterhouse & Co.*

A. C.

YOUNGER J. 1915 *July* 10, 17, 24. 1916 *Feb.* 14.

In re EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY.

[1909 S. 156.]

Settled Land—Capital Money—Improvements—Income or Capital chargeable—Infant Tenant in Tail—Exercise of Powers by Trustees of Settlement—Duties of Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 53, 56, 59, 60.

Testator by his will, made before but coming into operation after the Settled Land Act, 1882, empowered his trustees to pay the expenses of insurance, repairs, and other outgoings, and of care, management, cultivation, and improvements out of the income of his settled estate:—

Held, that the power was confined to improvements of a recurring character and did not extend to improvements authorized by the Settled Land Acts.

Walpole v. *Boughton* (1850) 12 Beav. 622 followed.

Where during the minority of a tenant in tail trustees of the settlement execute improvements authorized by the Settled Land Acts, which under a special power contained in the settlement may be paid for out of income, they must not necessarily charge the expenses of such improvements being of a permanent character

(1) [1898] 2 Ch. 643.

against income to the injury of the other persons interested under the settlement, merely because, owing to the interest of the infant tenant in tail in the income being cut down to an annuity, it may be to his advantage to have them raised out of surplus income.

ADJOURNED SUMMONS.

This was a summons taken out by the trustees of the will of the seventh Earl of Stamford and Warrington, who were also trustees for the purposes of the Settled Land Acts of the Cheshire estate thereby settled, for the determination (inter alia) of the question whether improvements within the meaning of the Settled Land Acts, 1882 to 1890, executed on or in connection with the Cheshire estate during the minority of the infant defendant, the present Earl of Stamford and Warrington, should be paid for out of capital moneys forming part of the Cheshire estate or should be paid for out of the rents and profits of that estate.

The facts, which are fully stated in the judgment of Younger J., were shortly as follows :—

By his will, made in 1875, the seventh Earl (who died in 1883) settled his Cheshire estate to uses under which the present Earl (who succeeded to the title in 1910) was now tenant in tail in possession, being an infant. The will contained a minority clause, empowering the trustees to pay all the costs and expenses of insurance, repairs, and other outgoings, and all other costs and expenses of care, management, cultivation, and improvements of the Cheshire estate, out of the rents and profits.

By the Earl of Stamford's Cheshire Estate Act, 1905, a sum of 125,000*l.* was charged on the estate and secured with interest by a 2000 years' term ; and by an agreement of compromise of June 19, 1912, between the trustees and the persons interested in the testator's other estates settled by the will it was agreed (clause 1) that all parties interested in the testator's estates should be bound by the provisions of the Estate Act, and (clause 2) that the rents and profits of the Cheshire estate should be applied, during the minority of the present Earl, first, in paying outgoings of the Cheshire estate, secondly, in keeping down annual charges and interest on incumbrances of the same estate, and, fourthly, in paying certain yearly allowances for the maintenance of the present Earl—the residue of the rents and profits to be paid to

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the trustees of a term in the testator's Lancashire estate for payment of incumbrances on all the estates.

This agreement had been confirmed by the Court without prejudice to the trustees' powers under the will, the Cheshire Estate Act, and the Settled Land Acts.

T. H. Carson, K.C., and *A. L. Ellis*, for the trustees of the will of the seventh Earl. The present Earl being tenant in tail has the powers of a tenant for life of the Cheshire estate under s. 58, sub-s. 1 (i.), of the Settled Land Act, 1882. Under s. 60 the powers of an infant tenant for life may be exercised on his behalf by the trustees of the settlement. By s. 22, sub-s. 2, the investment or application of capital money by the trustees is to be made according to the direction of the tenant for life. By s. 53, the tenant for life in exercising any power under the Act is in the position and has the duties and liabilities of a trustee for all parties entitled under the settlement. Therefore the trustees in exercising the powers on behalf of an infant tenant for life have to act as trustees for all parties. By s. 56, sub-s. 2, in case of conflict between the provisions of a settlement and the provisions of the Act the provisions of the Act are to prevail.

[YOUNGER J. The will was made before the Settled Land Act, 1882.]

Yes; but the testator died after the Act came into operation. The trustees decided to exercise their discretion by paying for the improvements out of the Cheshire capital moneys.

Austen-Cartmell and *A. Andrewes-Uthwatt*, for the present Earl. The Earl being infant tenant in tail in possession of the Cheshire estate with only a limited interest in the income, his interest is that improvements should be paid for out of surplus income.

The word "improvement" in the minority clause in the will covers any improvements authorized by the Settled Land Acts. The trustees have no discretion in the matter, but are bound to pay for the improvements out of the Cheshire rents. By the agreement of June 19, 1912, all parties interested in all the estates are bound by the provisions of the Estate Act. The effect of that is that the will is to be read as if the charge of 125,000*l.* was inserted before the limitations of the Cheshire estate. Clause 2 of the

agreement does not cut down the operation of the minority clause.

The testator's four estates constitute separate settlements. The only interest that a tenant for life of the Cheshire estate has to consider besides his own is the interest of the remainderman of that estate. He has not to consider the interests of the remaindermen of the other estates. The trustees have no other or higher discretion. Clause 2 of the agreement covers the expenses of improvements as part of the powers of management. The powers of the settlement and the powers of the Act are united in the same person. There is no conflict between them. The agreement of compromise must be taken as confirming the provisions in the will.

Trustees in exercising the powers of an infant tenant for life or tenant in tail must do so for his benefit. The trustees here have submitted the question to the Court.

[YOUNGER J. If you are to succeed in this case against the trustees it must be on the footing that they have committed a breach of their duty towards you.]

In *In re Duke of Newcastle's Estates* (1) the minority clauses, which were very similar to those in the present case, were held not to be put an end to by the Settled Land Act, 1882.

The trustees are not entitled to exercise the powers of the Settled Land Acts to the injury of the tenant in tail. The present case is analogous to that of a person having two powers, in which case he is presumed to have exercised the one which is most beneficial to him: *Earl of Lonsdale* v. *Lowther* (2); and as in this case the trustees are exercising powers on behalf of an infant they must be deemed to be exercising those which are most for his benefit: *Foljambe* v. *Willoughby*. (3)

[YOUNGER J. The whole point is whether the trustees are bound at your instance to ignore the interests of the persons entitled to these rents, although these are persons entitled under the settlement.]

No one can compel the tenant for life to exercise the powers conferred on him by the Settled Land Act. Here the trustees are being generous at the expense of the person entitled to the Cheshire

(1) (1883) 24 Ch. D. 129, 134. (2) [1900] 2 Ch. 687, 697.
(3) (1824) 2 S. & S. 165.

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estate, that is, at the expense of the infant tenant in tail. It is submitted that any works which fairly come within the terms "maintenance and upkeep" must be paid for by the trustees as provided by the will.

Then as to the discretion which the trustees are said to have exercised. It is submitted that they have not exercised any discretion at all. Assuming that the trustees had a discretion, they were bound to consider on each occasion on which the question arose whether the particular expenditure ought to be discharged out of income or capital. They were not entitled to act on a prejudged policy.

[YOUNGER J. referred to *In re Lord Stamford's Estate.* (1)]

That is exactly the converse case to this. In exercising Settled Land Act powers the trustees ought not, it is submitted, to interfere with the operation of the agreement of compromise into which all the parties have entered. The trustees ought not to exercise those powers at all if the exercise of them will not be for the infant's benefit. The effect of the agreement of compromise is that there is a trust providing for payment of the expenses of improvements out of income, and this trust comes before the trust for the tenant for life, and consequently the expenses must be borne by income: *In re Partington.* (2)

C. J. Mathew, K.C., and *W. R. Sheldon*, for the persons interested in the Staffordshire estate. The arguments put forward on behalf of the tenant for life are based on the fallacy that the persons interested in the Staffordshire estate had no interest under the settlement. It is submitted that they were quasi-tenants for life. The will was made before the Settled Land Act, 1882. The agreement of compromise was drawn after that Act was passed, and in it the word "improvement" is not used. Under the will the trustees could not have made these improvements at all. The will only enabled them to pay ordinary upkeep expenses out of income. The agreement of compromise does not extend their powers in this respect. Here the work done was of a capital nature and properly paid for out of capital money.

H. Terrell, K.C., and *Owen Thompson*, for the tenant for life

(1) (1887) 56 L. T. 484. (2) [1902] 1 Ch. 711.

in possession and the first tenant for life in remainder of the Leicestershire estate. Even if the word "improvement" were introduced into the agreement of compromise, it would not carry the matter any further. It would not increase the ambit of the power to repair. "Improvement" was not intended to enable the trustees to undertake rebuilding. When trustees exercise the powers of an infant tenant for life or in tail which are vested in him as trustee by s. 53 they do so as trustees. The powers are trustee powers. On the construction of the Act it is submitted that it makes no difference as regards the trustee powers whether the tenant for life is an infant or sui juris. When s. 60 speaks of a trustee exercising the powers of an infant "on his behalf" it does not mean "in his interest." In exercising the powers of the will the trustees must have regard not only to the interests of the tenant for life, but also to those of all the parties interested under it: *Hampden* v. *Earl of Buckinghamshire.* (1) That case is almost on all fours with the present. In exercising the powers of the Settled Land Act the trustees must consider the interest of every person who has any interest in the settled land. The same principle applies whether the trustees are acting under the powers of the settlement or under those of the Settled Land Act. If there is any conflict between those powers the powers of the Act are to prevail: s. 56, sub-s. 2. The infant is not entitled to say to the trustees that it is not to his interest that they should exercise the statutory powers. For the purpose of the statutory powers the trustees and the infant are the same person.

No question of mala fides arises in this case, and the trustees having exercised their discretion, the Court has no jurisdiction to interfere.

Clauson, K.C., and *H. T. Method*, for subsequent remaindermen of the Leicestershire estate. So far as the past improvements have been paid for out of capital the matter is over and done with. As regards the future, capital expenditure which permanently improves the inheritance ought to be discharged out of capital. *In re Tubbs* (2) justifies the trustees in the attitude they have taken up if they have a choice. Mr. Austen-Cartmell contends that

(1) [1893] 2 Ch. 531. (2) [1915] 2 Ch. 137, 140.

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they have no choice. [As to the meaning of "improvement" in the will they referred to *Walpole* v. *Boughton.* (1)]

Austen-Cartmell in reply. Sect. 60, which authorizes the trustees to exercise the powers of the tenant in tail, does not set them up as persons having independent powers. They exercise those powers as the alter ego of the infant and not as independent persons. They have no higher powers than the tenant in tail. It is not business to throw upon corpus what can legitimately be thrown upon income.

[YOUNGER J. Is not *Hampden* v. *Earl of Buckinghamshire* (2) against you ?]

It is suggested that the right form of order would be to declare that the trustees ought to pay out of the rents for such works and matters as they would, apart from the Settled Land Act, in the ordinary course of management and upkeep have paid thereout, notwithstanding that such works and matters may be improvements within the Settled Land Act. The primary trust in the will is to keep up the property. The powers of the Settled Land Act do not arise until the trusts of the will have been exhausted. The agreement of compromise makes no alteration in the position, except to introduce the 125,000*l.* and to alter the amount of the infant's maintenance. The Lancashire estate is not, it is submitted, "interested" under the settlement in the sense in which that word is used in the Act.

Cur. adv. vult.

Feb. 14. YOUNGER J. read the following judgment: All the other questions raised by this summons having been settled by agreement between the parties, and all personal claims, if any there were, against the applicants as trustees of the will of the testator in respect of the expenditure referred to in the summons having been definitely released and abandoned, I am now, having regard to the powers operative in relation to the testator's Cheshire estate, called upon to determine, as matter of law, whether improvements within the meaning of the Settled Land Acts, 1882 to 1890, executed on or in connection with the estate during the minority of the infant defendant, the tenth Earl of Stamford and Warrington, should be

(1) 12 Beav. 622, 624. (2) [1893] 2 Ch. 531.

paid for out of capital moneys forming part of the Cheshire estate, or should be paid for out of the rents and profits of that estate.

I have stated the question in the terms of the first part of the summons, but so stated the particular difficulty now to be solved, clearly emerging as it did in the course of the argument, does not very plainly appear. What the trustees under that paragraph of the summons really desire to know is, first, with regard to the past, whether in relation to improvements under the Settled Land Acts already executed since the death of the ninth Earl of Stamford and Warrington they were entitled to exercise the powers of a tenant for life under the Settled Land Acts by paying for such improvements out of capital moneys forming part of the testator's Cheshire estate, and, secondly, with regard to the future, whether during the minority of the tenth Earl they will be entitled to pay for any further improvements of the like character out of the like capital moneys, if in the exercise of their discretion they think fit so to do, and irrespective of their power to apply income for that purpose said to be contained in the will of the testator.

Having regard to the compromise which has been arrived at, any answer with regard to the past is now purely academic, but the parties, and particularly the trustees, are desirous of obtaining a decision both as to the past and the future, and I think that desire is reasonable under the circumstances.

The trustees suggest that both answers should be in the affirmative, as also, for reasons which will appear in the sequel, do the respondents to the summons other than the infant Earl, but that view, for other sufficient reasons, is challenged by the guardian ad litem of the Earl on his behalf. What I have now to decide, therefore, is how in respect of the expenditure referred to the duty of the trustees ought to be defined. I ought to say that while the trustees stated their views as to the position quite plainly they are entirely impartial in the matter and are ready and willing to act in every respect as the Court may direct.

The point at issue depends upon the terms of the will of the seventh Earl of Stamford and Warrington, who died in 1883, as affected by subsequent decisions and events. The will has involved much litigation and its provisions are now well known. It will suffice, therefore, if I restate as shortly as may be its general scheme,

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laying emphasis only upon those clauses which are directly relevant to the question now in debate. I will for this purpose follow broadly the statement contained in the report in [1912] 1 Ch. 343. The testator disposed of four large estates, defined respectively as the Staffordshire estate, the Leicestershire estate, the Lancashire estate, and the Cheshire estate, in his will referred to as the shire estates. During the lifetime of his widow he devised all of these estates to his trustees, subject to provisions for management and for the payment of two annual sums of 8000*l.* and 12,000*l.* respectively, upon trust to pay to his widow or permit her to receive for her separate use the rents and profits of the shire estates for her life determinable as therein stated. Subject to Lady Stamford's interest the shire estates were respectively settled in the following way. The Staffordshire estate was limited by way of legal uses in strict settlement in tail male, with remainder in tail general, under which, in the events which have happened, the defendant Dame Catherine Sarah Grey is tenant for life in possession and the defendant Sir John Foley Grey tenant in tail in remainder. The Leicestershire estate was limited to similar uses under which the defendant Mrs. Katharine Henrietta Venezia Grey is tenant for life and the defendant the Viscountess Mountgarret and the defendants Mrs. de Yarburgh-Bateson and Stephen Nicholas de Yarburgh-Bateson are respectively interested in remainder. The Lancashire estate was limited to trustees for a term of 1000 years, the trusts of that term being out of the rents and profits to discharge the mortgages and incumbrances on the four estates in the following order: Staffordshire first, then Leicestershire, then Cheshire, and lastly Lancashire itself. Subject to that term the Lancashire estate was settled as to one moiety to the uses of the Staffordshire estate and as to the other moiety to the uses of the Leicestershire estate. There was an ultimate limitation of both the Staffordshire estate and the Leicestershire estate to the uses of the Cheshire estate. That estate, obviously intended by the testator for the support of the title, was settled to uses in strict settlement in tail male without any remainder in tail general, and the respondent, the tenth Earl of Stamford and Warrington, is now tenant in tail of that estate. The will contained a clause revoking the estates of tenants in tail born in the testator's lifetime and reducing them to estates for life, as to which clause there was

a doubt whether it applied to the Cheshire estate, and certain so called minority clauses, one of which is the clause creating the difficulty which has now to be solved. That clause is to the following effect. It empowers the trustees "to make allowances and arrangements with tenants and to accept surrenders of leases and tenancies and out of the rents and profits to pay all the costs and expenses of insurance repairs and other outgoings and all other costs and expenses of care management cultivation and improvement and generally to do or cause to be done all such deeds matters and things respecting the care management cultivation and improvement of the same settled estate or to concur in any of the acts and things aforesaid in such manner as they or he could or might do if they or he were the owners or occupiers thereof."

It is convenient at this point to draw attention to a fact which may furnish some clue to the true meaning of the word "improvement" as used in the clause, namely that the minority clause is operative not only during the infancy of a tenant for life or tenant in tail of a shire estate, but was operative as to all the estates during the interest therein of the testator's widow, and that her right to the surplus rents was only a right to have these rents after all authorized prior payments thereout had been paid. The benefits given by the testator to his widow were most extensive and diverse; she was amongst other things his residuary legatee; and it is notable that it is only her interest in residue, which was absolute, that the testator, at least in express terms, subjected to what may be called capital charges.

The eighth Earl died in 1890 in the lifetime of the testator's widow and was succeeded in the title by the ninth Earl. Lady Stamford died in 1905, and thereupon the Cheshire estate was claimed by one John Grey, who asserted that he was the son of the eighth Earl, born out of wedlock, but legitimated, under the law of the Cape Colony, by the subsequent marriage of his parents. He commenced an action in the Chancery Division against the ninth Earl, the present Earl, and his own infant son, alleging that he was under the testator's will entitled in possession for his life to the Cheshire estate. In that action the ninth Earl counterclaimed that the revoking clause did not apply to the Cheshire estate, and he asked for a declaration that on the death of the testator's widow

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and in the events which had happened he, the ninth Earl, became entitled as tenant in tail male in possession, or alternatively as tenant for life in possession, to the Cheshire estate. Moreover, on the footing that his estate in the Cheshire estate was that of tenant in tail male in possession, he on March 23, 1905, executed a disentailing assurance of the Cheshire estate, which deed was duly enrolled. Ultimately the claim of John Grey as against the Cheshire estate was compromised upon terms which were embodied in the Earl of Stamford's Cheshire Estate Act, 1905, which became law on August 11 of that year. These terms in effect provided for the confirmation of the Cheshire estate to the ninth Earl and his issue, but subject to a charge of 125,000*l.* secured thereon with interest at the rate of 4 per cent. per annum by means of a term of 2000 years vested in trustees (hereinafter referred to as the John Grey trustees). After the expiration of the term, and in the meantime subject thereto, the Cheshire estate was limited to the use of the ninth Earl during his life without impeachment of waste, with remainder to the use of the present Earl, the defendant, in tail male, with remainder over.

The persons interested in the Leicestershire and Staffordshire estates under the testator's will were neither parties to nor were they bound by the Estate Act. On the other hand they were not entitled to the benefit of the compromise of the claims of John Grey thereby effected, and as against them it was competent for the ninth Earl or the present Earl to assert either these claims or the validity under the will of the testator of the disentailing assurance executed by the ninth Earl if it ever became to the interest of either of them so to do.

The ninth Earl died in 1910, having had issue two children only, of whom the elder was the present Earl, then fourteen years of age. As the ninth Earl was, on any view of the will of the testator, on the death of the testator's widow entitled for his life to the entirety of the rents and profits of the Cheshire estate, no difficulty during his life arose in giving full effect to the trusts of the term created by the Estate Act. But on his death the persons interested in the Staffordshire and Leicestershire estates set up the claim that, the present Earl being an infant, the minority clause again came into operation with regard to the Cheshire estate, and that as against

them no part of the rents and profits of the Cheshire estate could during the minority of the present Earl be applied in keeping down the interest on the 125,000*l.* secured to the John Grey trustees by the Estate Act. And it was manifest that the claim so put forward could only be got rid of by showing either (1.) that the minority clause was bad; or (2.) that it was no longer applicable to the Cheshire estate by reason of the fact that the revoking clause did not extend to the Cheshire estate and that the minority clause had been, as against the claimants, effectually got rid of by the disentailing assurance executed by the ninth Earl; or (3.) by establishing as against the claimants the validity of John Grey's title to the estate, John Grey being still living. In the face of that claim on the part of the Staffordshire and Leicestershire estates the trustees were in a difficulty as to the proper application of the income of the Cheshire estate during the minority of the tenth Earl, and on an originating summons, taken out by them in 1910, it was ultimately decided by the Court of Appeal (1)—(1.) that the minority clause, being at most only a power and not a trust to do something that the law would not allow, was perfectly valid, and (2.) that the Cheshire estate was not excepted from the revoking clause, and that accordingly the estate of the ninth Earl in this estate was merely an estate for life and the disentailing assurance executed by him was without effect. That decision of course still left it open to the present Earl to carry the case further and also to set up against the Leicestershire and Staffordshire respondents the title of John Grey; but with a view to avoid further litigation an agreement of compromise with these respondents was, subject to the approval of the Court, entered into on June 19, 1912, and clauses 1 and 2 thereof are as follows: "(1.) All parties interested in the said four estates"—that is, in the shire estates—"shall be bound by the provisions of the Estate Act. (2.) The rents and profits of the said Cheshire estate shall as from the death of the said ninth Earl so long as the trusts of the term of 1000 years now subsisting in the said Lancashire estate remain unsatisfied be applied in each year during the remainder of the minority of the present Earl and during the minority of any future tenant in tail male or in tail of the said Cheshire estate as follows

(1) [1912] 1 Ch. 343.

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that is to say: First in paying all rates taxes and other outgoings payable in respect of the said Cheshire estate. Secondly in keeping down all annual charges and the interest on all incumbrances for the time being subsisting on the said Cheshire estate (including the interest on the said sum of 125,000*l.* or the unraised part thereof for the time being and the interest (if any) of any principal sum or sums of money charged by statute or which may be charged by statute for succession duty upon the Cheshire estate or any part thereof. Thirdly in paying all sums required for and expenses in connection with the maintenance repair upkeep and management of the said Cheshire estate as provided by the said will and Fourthly in paying to Lady Stamford "—that is, Lady Stamford the mother of the tenth Earl—"or other the guardian or guardians for the time being of the present Earl or other such tenant in tail male or in tail as aforesaid for or towards the objects mentioned in the order next hereinafter referred to and for or towards the maintenance and education of the present Earl or other such tenant in tail male or in tail as aforesaid respectively the respective allowances of 3500*l.* and 1000*l.* per annum mentioned in an order dated the 23rd day of July 1910 and made in the said action by his Lordship Mr. Justice Parker at chambers or such greater allowances as shall respectively from time to time be determined by a judge of the Chancery Division of the High Court of Justice to be reasonable and proper but without prejudice to any discretion or right of objection incident to or implied by virtue of any discretion vested by the will in the trustees with regard to such allowances And the residue of such rents and profits shall be paid to the trustees of the said term of 1000 years to be applied by them upon the trusts of such term "—that is, the 1000 years' term in the Lancashire estate. Then clause 4 of the agreement provided that "These presents are conditional (1.) Upon the sanction of the Chancery Division of the High Court of Justice being obtained thereto so as to bind the present Earl the said Lady Jane Grey the said Stephen Nicholas de Yarburgh-Bateson and all interested persons who are not sui juris," and so forth. It will be noticed that the provisions of clause 2 are obligatory and not discretionary, but that they contain no direction to expend any part of the rents and profits of the Cheshire estate during the present Earl's minority

on improvements. That agreement was duly confirmed by the Court by an order dated July 31, 1912, but the order was in terms stated to be without prejudice to the powers of the trustees under the will of the testator and the said Cheshire Estate Act and the Settled Land Acts, 1882 to 1890, or otherwise.

No one at the hearing before me seemed to know how these saving words crept into the order, or at whose instance they were inserted, or what they were intended to achieve, and there was much argument as to their true effect. As the result of that argument I have arrived at the conclusion that, whether intended or not, one result of these words is to restore to the trustees the power under the minority clause to apply Cheshire rents and profits to "improvements" of the estate in the sense in which that word is used in the will of the testator. I have no doubt myself, however, that all reference to improvements was designedly omitted from the agreement itself. What I may call Settled Land Act improvements had always since the testator's death been provided for out of capital moneys. The right to require these moneys to be so applied, notwithstanding the assumed power to resort to income for the purpose under the minority clause, had been established by Lady Stamford when tenant for life before Stirling J. in 1887 (1), and his decision was followed and applied during the whole of her life. These improvements were of course so paid for during the life estate of the ninth Earl, and after his death and prior to the agreement the trustees had on behalf of the present Earl carried out various improvements within the meaning of the Settled Land Acts, and they had hitherto always paid for such improvements out of the capital moneys forming part of the Cheshire estate without question or remonstrance. On the death of the ninth Earl they did consider the question how improvements on the Cheshire estate should be paid for during the minority of the present Earl, and they came to the conclusion that such improvements as were of the nature of capital improvements ought to be paid for out of capital. It was not suggested before me that that decision was erroneous as applied to any of the improvements effected prior to those referred to in the present summons, and I do not find that

(1) *In re Lord Stamford's Estate*, 56 L. T. 484.

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any question as to the propriety of the trustees' action was ever raised until the month of December, 1914. On the 22nd of that month, however, in a letter to the trustees' solicitors, Messrs. Trower & Co., on behalf of the Earl, definitely raised the issue, so far as I can see, for the first time in any formal way. In my opinion, therefore, the omission of the word "improvements" from the agreement of compromise was deliberate, and I doubt whether it ever occurred to any of the parties at the time that the saving in the order had the effect of restoring to the trustees any power to apply income for that purpose. But it had that effect, I think, and the duties of the trustees must therefore be determined on that footing. I may, however, say at once that theirs is a power in this respect and not a trust, and that the case, therefore, on any view falls within the authority of *Clarke* v. *Thornton* (1) and *In re Tubbs* (2), and not within that of *In re Partington.* (3)

And the position of the trustees is indeed somewhat anomalous. Under s. 58, sub-s. 1 (i.), of the Settled Land Act, 1882, the infant Earl has the powers of a tenant for life, and during his minority the trustees of the settlement are, under s. 60, the persons to exercise his powers on his behalf. But the immediate interest of the Earl is in the capital of the estate, not in the income. His position is exactly the opposite of Lady Stamford's, who obtained Stirling J.'s decision. She was entitled to the surplus income and she had no interest in the inheritance; it was therefore to her interest to throw the expense of all permanent improvements on to capital. The Earl's interest is in the inheritance, his interest in surplus income during his minority is remote, and it is accordingly to his interest to throw the expense of all those improvements on to income if he properly can, and the question really is whether the trustees in exercising his powers on his behalf are bound, or indeed entitled, to consider only his interest in the matter.

This, however, assumes that upon the true construction of the testator's will the income of the Cheshire estate can under the minority clause be resorted to for Settled Land Act improvements, and this is by no means certain. My own view is that the word "improvements" in that clause has no such extended signification.

(1) (1887) 35 Ch. D. 307. (2) [1915] 2 Ch. 137.
(3) [1902] 1 Ch. 711.

The will was made in 1875, long before the word could have acquired any Settled Land Act meaning; it is found in a clause which is making provision for the expenses of upkeep and other income charges; there is no other word or phrase in the clause which imports anything but an income charge. Moreover, it has to be remembered, as I have already pointed out, that this clause by reference was made applicable to Lady Stamford's interest in the estate, and her personal interests were very carefully safeguarded by the testator throughout his will. In short I think the construction of the word in this will must be the same as that which, for similar reasons, was placed upon the same word by Lord Langdale in *Walpole* v. *Boughton* (1), cited by Mr. Methold, and the term does not, I think, here extend beyond improvements of an annual or recurring character, such for instance as, in Lord Langdale's words, are calculated "to improve the rents, for the benefit of the tenants for life," or are "necessary to induce the tenants to continue at their present rents." On this view it is doubtful whether any question will in practice ever really arise between income and capital; so few, if any, Settled Land Act improvements can be brought under such a description.

But I may be wrong on this point, and accordingly I proceed to consider the case on the footing that income of the Cheshire estate is under this will during minority available for Settled Land Act improvements. On that hypothesis it was argued by Mr. Austen-Cartmell for the infant Earl that the trustees on his behalf must never exercise his Settled Land Act powers to apply capital moneys in improvements so long as surplus income is available for the purpose. His argument was (1.) that if they did they would be considering the interests of persons who were not entitled under the settlement, and (2.) that unless it was to the interest of the infant to exercise his powers they ought not to be exercised. The latter contention was expanded by Mr. Uthwatt in this way. He said no tenant for life is compellable to exercise his powers. These powers are being exercised by the trustees on behalf of the infant. If the infant by his guardian or next friend objects to their exercise the trustees cannot properly exercise them and never

(1) 12 Beav. 622, 624.

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should they exercise them except for the benefit of the infant alone.

Now the first of these contentions is based upon the view that the interest of the Lancashire estate in the surplus Cheshire rents during the Earl's minority is not such an interest as makes the persons interested in Lancashire parties entitled under the settlement of the Cheshire estate within the meaning of s. 53 of the Settled Land Act, 1882.

I cannot accept this view. It is true that Lancashire has no estate under the Cheshire settlement, but the trustees exercising the powers of the minority clauses are trustees for Lancashire of the surplus rents. That interest in substance is not different from that of Lady Stamford during her life, although her right was described by another name. Nor can I think that during minority that interest is less substantial than, say, the interest of the annuitants in *Hampden* v. *Earl of Buckinghamshire* (1), which was nevertheless sufficient to induce the Court of Appeal to restrain a tenant for life from proceeding with a transaction injurious to their interests. As we know, s. 53 of the Act has received the widest interpretation, even tenants on an estate being treated as persons entitled: *Bruce* v. *Marquess of Ailesbury* (2); and to my mind it is almost unthinkable that the trustees, in exercising Settled Land Act powers on behalf of the infant Earl, are not bound to consider the interests of all persons entitled to the rents and profits of the estate for the time being, and Mr. Austen-Cartmell's first contention therefore in my judgment fails.

Nor am I able to accede to his second contention. In my view it is subversive of one of the main principles of the Settled Land Act, which is that a tenant for life, whether an adult or not, shall in exercising his powers act as a trustee for all parties entitled under the settlement, i.e., including himself but not excluding others. It is true that the Legislature, having decided as the main principle of the Act to leave the initiative in the hands of the tenant for life, a highly interested person, was compelled to accept the consequence that his trusteeship of his powers would be a highly interested trusteeship; but nevertheless the Act did

(1) [1893] 2 Ch. 531. (2) [1892] A. C. 356.

not release him from the obligation of acting as a disinterested trustee, and when it had to select persons to exercise the powers of a tenant for life unable on account of infancy to exercise them himself, it in s. 60 chose the trustees of the settlement, or failing them a person appointed by the Court, as being, I have no doubt, the most conveniently available embodiment of disinterested informed impartiality. And it is notable that the Act in s. 60 provides that where there are no trustees the appointment by the Court is to be made on the application of a testamentary or other guardian or next friend of the infant; it is careful not to confer the powers on any such person himself for the reason, as I have no doubt, that his relation to the infant would render it difficult, if not impossible, for him to exercise any of the powers with due regard to any interest beyond that of the infant himself. But the argument, or at least Mr. Uthwatt's, requires for its acceptance this proposition, that it is to the directions of the guardian or next friend, whom the Act passed over in the appointment, that the trustees must defer. Further, although it may be true that a tenant for life cannot be required to exercise his powers, it by no means follows that he will reach the ideal of the Act if he neglects or refuses in a proper case to exercise them. The powers are beneficial powers; they ought when the occasion arises to be exercised, and just as much during infancy as at any other time. And further, if the improvements are calculated to benefit the inheritance and are of a permanent character, then it is, in my view, the duty of the trustees exercising these powers to throw them upon capital even though they may have a fund of income available for the purpose. A fortiori ought they to do so in the present case, where the scheme of the will plainly, as I think, shows that it is not the intention of the testator that surplus income shall during minority bear the cost of permanent improvements on one of the shire estates, but shall go to the discharge of incumbrances upon all of them.

In my opinion, therefore, the proper declaration to make upon the evidence before me as to the past is to say that the improvements under the Settled Land Act already effected by the trustees during the minority of the infant Earl have been properly paid for out of capital moneys, and that, as to the future, improvements

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under the Settled Land Act which the trustees consider improvements of the inheritance may properly be paid for out of capital moneys, notwithstanding any power they as trustees of the settlement may possess to discharge them out of income, if, having regard to the interests of all persons entitled under the settlement of the Cheshire estate, they are of opinion that they should be so paid. With regard to the costs, they ought to be paid as between solicitor and client out of the Lancashire rents.

Solicitors: *Bower, Cotton & Bower; Trower, Still, Parkin & Keeling; Maples, Teesdale & Co., for Lord & Parker, Worcester; Smith, Fawdon & Low, for Wright, Son & Aysom, Leicester; Foyer & Co.*

W. I. C.

C. A. 1916 NEVILLE J. *Jan.* 13.

In re AN APPLICATION (No. 363,597) OF GEO. CORDING, LIMITED FOR THE REGISTRATION OF A TRADE MARK.

[1915 G. 1502.]

C. A. *Feb.* 29; *March* 1.

In re THE TRADE MARK (No. 360,911) REGISTERED IN THE NAME OF GEO. CORDING, LIMITED.

[1915 G. 1594.]

Trade Mark—Registration—Combination of Letters—Surname spelt backwards—Invented Word—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 11.

J. C. Cording, Limited, carried on business in Piccadilly, and Geo. Cording, Limited, in Regent Street. Both companies and their respective predecessors in title had for many years carried on business as manufacturers and sellers of waterproof goods, but neither company had a right to the exclusive use of the word "Cording."

In 1914 Geo. Cording, Limited, who were the registered proprietors of the trade mark "Gnidroc" in class 38 in respect of waterproof clothing, applied to register the same word as their trade mark in class 40 for indiarubber and gutta-percha goods. The application was opposed by J. C. Cording, Limited, but the registrar decided against them. Thereupon they appealed, and also moved to expunge the word "Gnidroc" from the register

in respect of goods in class 38, and the two applications came on together :—

Held by Neville J., that "Cording" spelt backwards was registrable as a trade mark ; but

Held by the Court of Appeal, that the application of Geo. Cording, Limited, was not made bona fide and that "Gnidroc" was intended and calculated to deceive within s. 11 of the Trade Marks Act, 1905 ; that it ought not to be registered in class 40 and ought to be expunged from class 38.

In 1839 J. C. Cording commenced business as a maker and seller of waterproof clothing at No. 231, Strand, and carried it on continuously until shortly before his death in 1860, when he sold and transferred it to his brother George Cording, who continued to carry it on under the style of J. C. Cording until his death in 1865. The executors of George Cording sold the business and the goodwill thereof to one Wilson, who carried it on under the firm name of J. C. Cording & Co. and in 1874 transferred it to No. 19, Piccadilly.

In April, 1902, the firm was incorporated under the style of "J. C. Cording & Co., Limited."

George Cording left an infant son, and in 1874 George Cording the son (shortly after he had attained his majority) started business as a maker and seller of waterproof clothing at No. 125, Regent Street and carried it on until his death in January, 1912. After his death two persons who had under an agreement acquired the business and the goodwill thereof carried it on until April, 1914, when they assigned it to "Geo. Cording, Limited." This business prior to its incorporation was always carried on under the style of George Cording, or Geo. Cording, or G. Cording. Their right to use the name Cording was not disputed.

In July, 1914, Geo. Cording, Limited, applied to register the mark "Gnidroc"—pronounced nidroc—as a trade mark in class 38 in respect of waterproof clothing and, there being no opposition, it was duly registered. The word was in fact the surname "Cording" spelled backwards, and was invented by one of the directors of the company.

In December, 1914, Geo. Cording, Limited, applied to register the word "Gnidroc" as a trade mark in class 40 for indiarubber and gutta-percha goods. This application came to the knowledge of and was opposed by J. C. Cording & Co., Limited, on the grounds

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(1.) that the combination of letters composing the mark was not a trade mark at all and not proper to be registered; (2.) that such combination was not an invented word or a word at all, but a spelling backwards of the name "Cording" under which J. C. Cording & Co., Limited, and their predecessors had for upwards of seventy-five years carried on the business of making and selling waterproofs, and which had become widely known and used as a short name for their goods; and (3.) that the registration of the word "Cording," even when spelled backwards, was likely to deceive and to lead to the waterproof goods of Geo. Cording, Limited, being passed off or mistaken for those manufactured or sold by J. C. Cording & Co., Limited.

On August 16, 1915, the registrar held that the mark was a collocation of letters which suggested an invented word rather than a surname and that, assuming (without deciding) J. C. Cording & Co., Limited, had the exclusive right to the surname "Cording," the mark would neither be mistaken for that surname nor would cause the goods to which it was applied to be mistaken for goods bearing that surname. He came to the conclusion, therefore, that the mark was an invented word within the meaning of the statute and was a perfectly good trade mark.

J. C. Cording & Co., Limited, appealed against the decision of the registrar. During the above proceedings J. C. Cording & Co., Limited, ascertained for the first time that the word "Gnidroc" was already registered as a trade mark in class 38 in the name of Geo. Cording & Co., and thereupon they at once gave notice of motion to rectify the register by removing therefrom that trade mark on the same grounds as those on which they opposed the application to register it in class 40. The appeal and the motion to rectify were by consent consolidated and now came on together, and it was agreed that the statutory declarations filed on the application to register should be read as the affidavits in both matters. The evidence is sufficiently noticed in the arguments and judgment.

The motion was heard before Neville J. on January 13, 1916.

T. Terrell, K.C., and *Ashton Cross*, for J. C. Cording & Co., Limited. By s. 3 of the Act a "mark" includes any combination of letters, and a "trade mark" means a mark used in connection

with goods for the purpose of indicating that they are the goods of the proprietor of the trade mark, and a "registrable trade mark" means a trade mark which is capable of registration under the provisions of the Act; and then s. 9 defines the essentials of a registrable trade mark. (1) Therefore a mark before it can be a registrable trade mark must be a trade mark used or intended to be used for the purpose of denoting that the goods are the goods of the proprietor of the trade mark. It is submitted on our evidence

(1) The Trade Marks Act, 1905, s. 3: "In and for the purposes of this Act (unless the context otherwise requires):—

"A 'mark' shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof:

"A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale:

"A 'registrable trade mark' shall mean a trade mark which is capable of registration under the provisions of this Act: . . . ."

Sect. 9: "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

. . . . . .

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons."

Sect. 11: "It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design."

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that the mark is to be used for the purpose of concealing that fact, and of getting our trade. It does not indicate the goods of the respondents, and therefore is not a registrable trade mark. In the trade the word "Cording" means J. C. Cording & Co., Limited, and the use of this mark, which is a mere misspelling of "Cording," will produce confusion and is calculated to deceive persons purchasing goods of the respondents into the belief that they are purchasing our goods. Secondly, it is not an invented word at all. Spelling a word backwards is not inventing a word. Lastly, it is not a word at all. It is unintelligible and not distinctive, and is an indirect attempt to register that which they cannot register directly, and is not a bona fide application.

Kerly, K.C., and *Underhay*, for the respondents. The mark is a word that can be pronounced. It is a distinctive combination of letters, and is not an evasion of the statute. Further, it is an invented word and not calculated to deceive. But if it is not an invented word, it can still be supported under s. 9, sub-s. 4, because it is a word which has no reference to the character or quality of the respondents' goods and is not a geographical name or surname. But if it is not a word, it is a combination of letters and is a distinctive mark within s. 9, sub-s. 5. On our evidence the appellants have no monopoly of the word "Cording." Assuming that each party is entitled to the word "Cording," why may not the respondents use the word in a particular manner? Sect. 9, sub-s. 1, contemplates that a company or firm may represent their name in a particular manner. "Gnidroc" is an original way of representing the word "Cording." The application was made in good faith, and the registration of the mark will not tend to mislead the trade or the public, or give the respondents any unfair advantage in competing with the appellants or prejudice them in any way.

Austen-Cartmell, for the Board of Trade.

T. Terrell, K.C., in reply.

NEVILLE J. This case raises a curious point, but in my opinion the registrar was right in the order that he made and for the reasons that he gave. I have to consider first of all whether the combination of letters which, when pronounced according to the ordinary rules of English pronunciation, spell "Gnidroc" is "an invented word,"

to quote sub-s. 3 of s. 9 of the Trade Marks Act, 1905; and secondly whether, if it is not, it is a word within the meaning of sub-s. 5 of s. 9 so as to require an order of the Board of Trade or the Court before it can be admitted to registration. I think the expression "invented word or words" is used in sub-s. 3 in contradistinction to the expression "word or words" used in sub-ss. 4 and 5. In other words, I think that sub-ss. 4 and 5 refer to real words, and sub-s. 3 refers to invented words, that is, words that have no existence beyond the fancy of the person who has used them, and which do not in any language convey any known meaning to the ear of the person acquainted with the tongue. That being so, I think "Gnidroc" is a "mark" within the definition of s. 3 of the Act because it includes a combination of letters, and is distinctive, and that would make the mark a distinctive mark within sub-s. 5 of s. 9 even if the combination of letters was not an invented word. I am also of opinion that it is an invented word because it is not a real word, and I do not think it at all matters how the person who seeks to use it arrived at the combination of letters which does form a pronounceable word, although meaningless, not only in the English language, but, so far as I know, in any other language.

Upon the evidence I do not think that the appellants have proved any exclusive right to the use of the word "Cording," and, even if they had, I think the question they have raised as to the alleged desire of the respondents to take advantage of their reputation in the trade is a question to be considered under s. 11, and not under the sections with which I am dealing. I also think no adequate case has been made out under s. 11 to require further consideration, and therefore I hold that the respondents' application is an honest attempt to register the word "Gnidroc" as a trade mark. It appears to me that probably not one person in a hundred—who was in the habit of seeing this word and who had not the assistance of any one to prompt him as to its origin—would ever discover that it was "Cording" spelled backwards. It certainly would not occur to me.

In my opinion the respondents have a right to the registration of the word "Gnidroc" as a trade mark, and the decision of the registrar must be affirmed.

H. L. F.

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J. C. Cording, Limited, appealed. The appeal came on for hearing on February 29, 1916.

T. Terrell, K.C., and *Ashton Cross*, for the appellants, made use of the same arguments as in the Court below, and also referred to s. 11 of the Trade Marks Act, 1905.

Kerly, K.C., and *Underhay*, for Geo. Cording, Limited, relied on the arguments urged before Neville J.

Austen-Cartmell, for the Board of Trade.

Cur. adv. vult.

March 1. LORD COZENS-HARDY M.R. There is a double application here, first, to refuse registration of "Gnidroc" in a new class; and, secondly, to remove "Gnidroc," which was registered about twelve months, or a little more, before this proceeding was taken, in another class. These two motions were consolidated; and I shall treat them as one motion, for the conclusion which one arrives at on the one motion really involves the other, and no distinction was made in the argument before us.

J. C. Cording & Co., Limited, and their predecessors have carried on business for seventy-five years or a little more. For a long time they were the only persons named "Cording" engaged in the manufacture and selling of waterproof goods. In 1874 George Cording, who was then a very young man, just attained twenty-one, started an opposition business and called it "Ye Old House of Cording," when the other business was not only the original Cording business, but had been carried on, as I say, for many years before his was started. George Cording died in January, 1912. In April, 1914, this company was registered, "Geo. Cording, Limited." There is no satisfactory explanation of what happened in the interval between 1912 and April, 1914, but I assume in favour of Geo. Cording, Limited, that they had acquired such rights as George Cording had in this matter.

Now what has happened since April, 1914, when the company was registered? In my opinion the evidence is clear that there were many attempts by Geo. Cording, Limited, or their managing directors, for whom they are responsible, to use "Cording" alone, both on circulars and on the business premises in Regent Street.

I cannot exempt them from an attempt which to my mind is really fraudulent. I will indicate in a moment one or two facts which impress me very much on that. But to clear the ground, neither the applicants nor the opponents have any exclusive right to the word "Cording." That is quite clear.

What we have to consider is, what was the position of Geo. Cording, Limited, a little more than a year before this application was started. We have had photographs of the premises; and it is impossible to look at them without seeing that in every conceivable way they emphasized the word "Cording," and put the "Geo." and the "Limited" so much in the background that a microscope or a telescope was wanted to see that it was the name of the company and was not "Cording." Then they actually put upon their invoices and their papers the medal granted at the Great Exhibition of 1851, as though it was their property. That medal was won before George Cording was born. That is a matter which seems to me to throw light upon the conduct of the parties, and none the less that physically the actual medal seems to have got into the possession of George, under circumstances which we know nothing about; but I think I am right in saying that it is not pretended that Geo. Cording, Limited, have any right whatever to that medal itself.

Then this happened. Having a well-known trade mark of Temple Bar, with some other device in the middle, they applied for "Gnidroc." What is that? It is really "Cording" written backwards. I ask myself, Why was that done? And the answer I feel bound to give is this, that it was another move in the game which they were playing to secure to themselves the advantage of the name "Cording" and of the long-established goodwill connected with that business. "Gnidroc" I suppose is what it means. It is plainly nothing more than "Cording" written backwards. At the same time, or about the same time, they selected what they were quite entitled to do, a cable name; and that was "Nidroc" with the letter "g" omitted. J. C. Cording & Co. had no objection to that. They said in the Court below, as they say here, that they have not the least objection, as far as they are concerned, to this "Nidroc" being registered, or remaining on the register, provided they leave out the one letter, so that it is not "Cording" written backwards.

In these circumstances, what is our duty? When I once find, as

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I do find, an intention on the part of Geo. Cording, Limited, not to trade honestly in their own name, Geo. Cording, Limited, but by various devices to attempt to get the benefit of the reputation attached to "Cording" alone, I assume, as I think I am bound to assume when I find a fraudulent attempt like that, that what they are doing is not merely intended to deceive, but is calculated to deceive the public into thinking that they are the real "Cordings."

Approaching it in that way, I think there are various answers to this application. Having come to the conclusion that the mark was intended to deceive, the next step is that it was calculated to deceive; and, that being so, I think we are bound to say that this case comes within s. 11, and that the mark which was registered in 1914, and of which no notice reached J. C. Cording & Co. until this pending application to object to the new registration, ought to be removed and no new registration of "Gnidroc" ought to be allowed.

But it does not quite rest there, and I wish to say a word or two about this. It is said that this is an invented word. I am not sure that it is an invented word. There is no invention in the matter at all. It is simply writing backwards the name "Cording." "Cording" certainly could not have been registered as a trade mark under the Act—I mean in this sense, that the registrar or the Court would have been bound to refuse it, even though it may have complied with the statutory provisions as to being itself a registrable trade mark. The discretion of the registrar and of the Court comes in plainly as to the new mark, and I think it also comes in, though under a different section, in respect of the mark which was registered in the year 1914.

But then it is said, If it is not an invented word it is—what? The name of a company, individual, or firm represented in a special or particular manner. It is not the name of a company, because that is not the name of the company. The name of the company is "Geo. Cording, Limited." I do not know who the individual is who is said to be Cording here, and it is not, as it seems to me, represented in a special or particular manner, unless writing the word backwards is a particular representation of the word "Cording."

I prefer to base my judgment on the first view which I have

taken. I do not altogether follow, and it is not necessary to say more, the argument put before us by Mr. Terrell, that this is not a trade mark within the definition of s. 3. I think if it is a registrable trade mark, not merely a trade mark but a registrable trade mark, the result follows that it ought not to be registered, because it is calculated to deceive.

For these reasons I think that the appeal succeeds as to both consolidated motions; the new mark must be refused registration, the register must be rectified as to the old mark, and the costs will follow the event.

PHILLIMORE L.J. For reasons which I hope to give later on in my judgment, I do not think we can consider this case without some reference to the previous history of the family of Cording, and the carrying on of business in this particular trade by persons having or claiming to use that name.

The history for this purpose may be quite shortly stated. One John Charles Cording founded the business. When he died it went to his brother, George Cording. When George died the goodwill of the business was sold by the executors, and was bought by a gentleman of the name of Wilson, from whom the opponents in this case, J. C. Cording & Co., Limited, derive their title. They are the representatives of the original users of the name "Cording" in connection with this business. George Cording had a son, George, who was an infant at the time that his father's business was sold for the benefit of himself, among others; and George, when he came to man's estate, on several occasions attempted not merely to trade in his own name, as he was entitled to do, but to trade in his own name without sufficiently distinguishing himself from the old-established business of J. C. Cording. When he died, according to the affidavit of Mr. Morrison, who is the business manager of the applicant company, he, Morrison, and a certain William Creek became entitled to the business of the second George Cording, and they assigned their business to the applicant company, Geo. Cording, Limited. Both in the younger George Cording's time, as I have said, and since, in the time of the company, Geo. Cording, Limited, many attempts have been made to annex that which at the best was common to the two firms. The applicant company were entitled

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to carry on business using the name "Cording," but as the other company were the old-established company, they were bound to distinguish their business from the other business; and on several occasions, sometimes with partial success and sometimes otherwise, George Cording the second and the company have attempted to get that which they have no right to get, namely, to get themselves represented as the Cording, when they were not entitled to do more than trade as Cording with a distinction showing that they were not the original Cording.

It is in those circumstances that Geo. Cording, Limited, applied for the registration of the word "Gnidroc," which is simply the one word "Cording," about which there has been this trouble for something like forty years, spelt backwards.

Now we have to apply to that the law with regard to the registration of trade marks. It is possible under s. 9 to register the name of a company, individual, or firm represented in a special or particular manner; it is possible to register an invented word or invented words; and it is possible to register any other distinctive mark with certain qualifications. It is unnecessary to consider the other classes of possible registration.

I think the result of the decisions is that a word misspelt is not an invented word at all. I think that that is the principle upon which the *Uneeda Case* (1), the *Phit-eesi Case* (2), and cases of that kind must really be held to have been decided. They may have been decided also on the registrar's discretion; but they could quite well have been decided on the ground that they were not invented words. In one of the cases—*In re Meyerstein's Trade Mark* (3)—Kay J. says that there is a great paucity or poverty of invention. I should go a little further and say that in these cases, in the legal sense of the word, there is no invention. A misspelt word can only come in, if at all, under s. 9, sub-s. 5, as a conglomeration or agglomeration of letters which can be shown to be distinctive. This being rather a new case, one has to see whether or not the same principle should be applied to a proper name well known to all, or some English word spelt backwards. I think the right view to take is to apply to that class of cases the criterion which has been

(1) [1901] 1 Ch. 550; [1902] 1 Ch. 783. (2) Not reported.
(3) (1890) 43 Ch. D. 604, 605.

applied to misspelt words. They are not invented words. As Lord Halsbury said in the *Solio Case* (1), nobody could register "cheap and good"; and nobody could register "cheap and good" if he miswrote it "cheapandgood"; and to my mind the word "Gnidroc" is merely spelling backwards a name in common use in the trade, and must be treated in the same category as a misspelt word. Under s. 9, sub-s. 1, the name of a company, individual, or firm represented in a special or particular manner can be registered. There is no special or particular manner in this case; nor would the word "Cording" be the name of a firm. But even under s. 9, sub-s. 1, the registrar would have to use that discretion which I think is vested in him. If the name of an individual was Tom Brown, or John Smith, or if the name of a company was the Tubes Company, Limited, I will not say that some very special manner of registering that name might not be allowed; but it would have to be a very special or particular manner which would allow the registration of such a common name, even if it were the full name, "Tom Brown" or "John Smith," still more if it were the name "Brown" or the name "Smith." In connection with this business carried on in London, as both these firms are carried on in London and in the west end of London, "Cording" is to all intents and purposes as familiar as "Smith" or as "Brown"; and therefore, if it were an application under s. 9, sub-s. 1, one would have to consider whether or not the name "Cording" represented in the special or particular manner, being spelt backwards, would stand. I know it is not put under sub-s. 1, but I cannot help considering it in framing my judgment upon this case. As I have said, I do not think that it is an invented word. If it stands at all, I think it stands as "any other distinctive mark"; and I do not think it is a distinctive mark.

That is one ground upon which I think this matter might possibly be decided; but when I come to s. 11 and remember the construction which has been put upon s. 11, especially in the *W. & G. Case* (2) in the House of Lords, it seems to me that s. 11 is a bar to the application to register this word. The words in s. 11 are "calculated to deceive." If I remember aright, Lord Parker, in delivering the judgments of himself and two other learned Lords in the *W. & G.*

(1) [1898] A. C. 571, 577. (2) [1913] A. C. 624.

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Case (1), puts, instead of "deceive," "mislead," which is in some ways a lighter word; but in that case, as in other cases, it has been said not only that the mark must not be calculated to deceive or mislead, but, as Lord Watson said in *Eno* v. *Dunn* (2), the applicant has the burden of proof upon him to show that it will not deceive or mislead; and it is not enough to leave it in doubt. Here I bring in, in connection with this matter, the conduct of the applicants in this case. I am not saying that there may not be cases in which some word or words spelt backwards might not be admitted under heading 5 as eligible for registration as a trade mark; but in this particular case one cannot divest oneself of the view that this is a stage in the campaign between these two firms. It is another attempt to annex that word which Geo. Cording, Limited, have no right to annex as their own and make private for themselves; and I am not sure that we do not get some help, although the argument is no doubt rather subtle, from s. 3, and that one may not say that this is not done bona fide; that it is not done for the purpose of indicating that these goods are the goods of Geo. Cording, Limited, but it is done for the purpose of obtaining the use of the word "Cording" as far as possible for this company.

Upon those grounds, indicating them shortly as I have done, I think that this attempt should not succeed, and that the mark which is already upon the register should be taken off.

WARRINGTON L.J. I am of the same opinion. There are two companies, one J. C. Cording & Co., Limited, and the other Geo. Cording, Limited. They both carry on trade of the same nature in the near neighbourhood of each other. Each has, as will have appeared from what I have said, as a part of its name the surname "Cording." I am satisfied on the evidence that there had been in the past constant endeavours on the part of Geo. Cording, Limited, and their predecessors at least to emphasize that part of their name which is common to both at the expense of that part which is distinct. Geo. Cording, Limited, have a trade mark which is unexceptionable, consisting of a representation of Temple Bar with a monogram representing the letters "G. C." in the middle of the centre arch. They now seek to register, and as to some goods

(1) [1913] A. C. 624. (2) (1890) 15 App. Cas. 252, 257.

have already registered, a word composed of the same letters as the common word, but written backwards.

As to the question whether a word which is compounded of the same letters as a known word but written in a different order, or in the reverse order, can be properly registered as an invented word, I prefer to say that at present I am not satisfied that it can be; but I think this case can be decided against Geo. Cording, Limited, on other grounds. Having regard to their previous conduct and that of their predecessors in business, I think this is another endeavour, pushed a little further than their previous endeavours, to obtain an unfair advantage from the possession of the common name; and so regarded (to refer to s. 3 of the Trade Marks Act) the proposed user of the trade mark is not bona fide for the purpose of indicating that the goods in connection with which it is used are those of the applicant, but that the proposed user is for another and less honest purpose.

The matter does not rest there. The trade mark is, in my opinion, one that is calculated to deceive, because I think it is obvious that a not very honest trader dealing in these goods might well point out to a customer that the mark "Gnidroc" is "Cording" in another form, and thus obtain custom from those who only knew, or were in the habit of dealing with, the appellants as "Cording." I think it is much more important that the Court should discourage any possible dishonesty of trading rather than that it should gratify the desire of a trader to register a particular mark.

I agree that the order allowing this mark to be registered ought to be reversed, and that the existing mark ought to be expunged from the register.

Appeal allowed.

Solicitors: *Vallance & Vallance; Garrard, Wolfe, Gaze & Clarke; Solicitor to the Board of Trade.*

H. C. R.

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Feb. 23, 24; *March* 9.

In re GARRETT'S APPLICATION TO REGISTER A TRADE MARK.

Trade Mark—Registration—Discretion of Registrar—Letter Marks—Initials of Firm spelt out—"Ogee"—Dictionary Word—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 11, 12, 19.

Subject to the limitations imposed by the Trade Marks Act, 1905, the registrar has a discretion to refuse or accept an application for the registration of a mark, but his exercise of that discretion must not be unreasonable or capricious.

G., trading as O. G. & Co., applied to register the word "Ogee" as a trade mark in class 3. O. G. & Co. were an old firm. They had many years ago used first the letters "O.G.," the initials of the firm, and afterwards the word "Ogee" to distinguish their goods. In 1898 and 1903 they had, without opposition, registered "Ogee" in different classes, and had used the word as a trade mark in respect of goods in class 3, and their goods were known and sold as "Ogee" goods. The registrar refused the application on the ground that "Ogee" was simply the letters "O.G." spelt out, and that letters could not be registered as distinctive marks.

Sargant J. reversed the decision of the registrar, holding that "Ogee" prima facie meant the dictionary word used in architecture, and that, having regard to the long user of the word by the applicant and his registration of it in other classes, the present registration ought to be allowed upon the applicant's disclaiming any exclusive right to the letters "O.G." or either of them :—

Held, on appeal, that s. 12, sub-s. 2, expressly gave the registrar a discretion, and it was also clear from *Eno* v. *Dunn* (1890) 15 App. Cas. 252, and *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* [1913] A. C. 624, that whilst the registrar was in certain cases prohibited from registering, still he had in cases where there was no such prohibition a discretion which must not be unreasonably or capriciously exercised. In the present case the registrar was right in refusing the application. If the application had been for the registration of the letters "O.G." it would have failed on the authority of *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* "Ogee," although a dictionary word, represented the letters "O.G." written out. A trade mark appealed to the ear as well as the eye, and possible confusion might arise from the sound. The disclaimer of the exclusive right to use the letters themselves did not meet the case.

Decision of Sargant J. reversed.

APPEAL from a decision of Sargant J.

On May 19, 1915, T. W. Garrett, carrying on business as a wholesale hairdressers' sundriesman under the firm name of Osborne,

Garrett & Co., applied for the registration of the word " Ogee " as a trade mark in the following classes : Class 3, for chemical substances used in pharmacy ; class 48, for perfumery ; class 50, for hair frames and miscellaneous articles. He had previously, in 1898 and 1903, registered the word " Ogee " as a trade mark in other classes. He was willing by an entry on the register to disclaim, under s. 15 of the Trade Marks Act, 1905, any right to the exclusive use of the letters " O.G.," and that the marks should be associated under s. 24.

The word " ogee," derived from the French " ogive," is a term well known in architecture and carpentry, meaning a moulding that presents a double-curved line. Osborne, Garrett & Co. had for a long time past adopted and used first the letters " O.G." and afterwards the word " Ogee " to distinguish their goods, and there was evidence that their goods were known and sold as " Ogee " or " O.G." goods.

The Registrar of Trade Marks refused the application on the ground that prima facie the word " Ogee " was simply the letters " O.G." spelt out, and that letters could not be registered as distinctive marks. The practice in trade of using the initials of firms was so hardened that they did not amount to distinctive marks, and to grant the exclusive use of any letters to any trader would be oppressive.

The applicant appealed to the Court by motion from this decision, and the motion came on for hearing on December 3, 1915, before Sargant J.

Sargant J. held that " Ogee " prima facie meant the dictionary word ; and that, having regard to the long user of the word by the applicant and his registration of it in other classes, the present registration ought to be allowed on the applicant disclaiming any exclusive right to the letters " O " and " G " or either of them by virtue of the present registration. He also held that letters were not absolutely barred from registration as trade marks.

From this decision the registrar appealed.

Sir George Cave, S.-G., and *Austen-Cartmell*, for the registrar. Under the Trade Marks Act, 1905, the registrar has a discretion to decide whether or not a trade mark ought to be admitted to registration. That discretion is one which ought to be exercised for the benefit of the public present or future, even in cases which fall

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within pars. 1 to 4 of s. 9 of the Act. That the discretion is an absolute discretion is clear from *Eno* v. *Dunn* (1), which was decided upon principle and did not depend upon its particular facts: *In re Compagnie Industrielle des Pétroles' Application* ("*Motricine*"). (2) The discretion, therefore, ought not to be interfered with except upon grounds on which the exercise of any other judicial discretion would be interfered with.

If the registrar has a discretion in the matter, it is submitted that he was right in refusing to allow the word "Ogee" to be registered. The word "Ogee" is merely the writing out of the letters "O" and "G," and to allow it to be registered would amount to the appropriation to the applicant of a practical monopoly of the use of the letters "O" and "G" and would lead to confusion and oppression.

Eastman Photographic Materials Co. v. *Comptroller-General of Patents, Designs, and Trade Marks* ("*Solio*") (3), where it was held that "Solio" was an invented word and could be registered, was cited to Sargant J. in the Court below as showing that pars. 3 and 4 of s. 9 were independent of each other. In *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* ("*W. & G.*") (4) the House of Lords held that a mark consisting of the letters "W" and "G" was not distinctive within the meaning of s. 9, sub-s. 5, and was therefore not registrable.

[WARRINGTON L.J. The applicant's contention will be that "Ogee" is a word notwithstanding it is represented by the letters "O" and "G."]

A mark must be distinctive both to the eye and the ear: *Seixo* v. *Provezende* (5); *In re Trade Mark of La Société Anonyme des Verreries de l'Etoile* ("*Red Star Brand*") (6); *In re John Dewhurst & Sons' Trade Mark.* (7) In the oral use of "Ogee" one cannot say whether the letters "O.G." or the architectural term "ogee" is intended. In *In re Verschure and Zoon's Application* (8), where the initials of the applicants' firm name were "V.Z.," the word "Vezet" was allowed to be registered as a trade mark. There were special circumstances in that case. That case came within

(1) 15 App. Cas. 252, 256.
(2) [1907] 2 Ch. 435, 444.
(3) [1898] A. C. 571.
(4) [1913] A. C. 624.
(5) (1866) L. R. 1 Ch. 192.
(6) [1894] 1 Ch. 61.
(7) [1896] 2 Ch. 137.
(8) (1905) 22 Rep. Pat. Cas. 568.

par. 3 of s. 9, whereas the present case comes within par. 4. It is submitted, therefore, that the registrar has properly exercised his discretion and that the Court ought not to interfere.

Walter, K.C., and *L. B. Sebastian*, for the applicant. This is an attempt under the guise of discretion to add words to the Act of Parliament. By s. 3 of the Act "mark" is defined to include a word, and "trade mark" a mark used or proposed to be used upon or in connection with goods. Sect. 9 enumerates the essential particulars of a registrable trade mark. The registrar has no discretion to refuse to register marks which contain essential particulars and fall within pars. 1 to 4 of s. 9. His only discretion arises under par. 5. That discretion is a judicial discretion.

[PHILLIMORE L.J. The discretion must not be capriciously exercised and must be subject to an appeal.]

The chief exercise of the discretion by the registrar is with regard to existing trade marks, whether a proposed mark is so like one already on the register that its registration would be calculated to deceive. *In re Farbenfabriken Application* ("*Somatose*") (1) shows that the discretion given to the registrar is not an unfettered discretion, but one which must be exercised subject to the provisions of the Act. There is no discretion to refuse registration unless the case falls within s. 11, which restricts registration of marks calculated to deceive, or s. 19, which provides for the case of identical marks already on the register.

[*Austen-Cartmell.* Sect. 60 gives power to the Board of Trade to make rules which, by sub-s. 2, are to be of the same effect as if they were contained in the Act.]

If the rules extend beyond the Act they will be ultra vires. The words "subject to the provisions of this Act" in s. 12, sub-s. 2, govern the whole question of the discretion of the registrar to allow or refuse registration. There is no halfway house. It must either be the personal view of the official or an adjudication in accordance with the provisions of the Act: "*W. & G.*" *Case.* (2) The mark in the present case has been in existence for twenty years.

It would be an absolute departure from trade mark law if the Court were to hold that the registrar has an unfettered discretion.

(1) [1894] 1 Ch. 645. (2) [1913] A. C. 624.

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In Kerly on Trade Marks, 3rd ed. pp. 76 et seq., there is a table showing the reasons given by the registrar for the refusal by him in the exercise of his discretion to allow registration in cases which have come before him.

The remarks in *Eno* v. *Dunn* (1) as to the exercise by the registrar of his discretion were dicta only. It would be a very serious matter if there were to be no limitation imposed on the discretion exercised by the registrar.

As to the "*Solio*" *Case* (2) and the "*Somatose*" *Case* (3) it is submitted that the Court there mixed up the two sub-sections of s. 64 of the Act of 1883. So here the registrar has mixed up pars. 4 and 5 of s. 9 of the present Act. The registrar here refused to register in exercise of his discretion under par. 5 of s. 9. There is no finding in the reasons given by him that the mark would be calculated to deceive. No one, it is submitted, would be hurt by the registration of the word "Ogee." The word is absolutely meaningless in connection with the goods with which it is used.

It is submitted that the registrar has given his decision by applying to par. 4 the considerations which apply to par. 5. The applicant applied for registration under par. 4 and not under par. 5. Under par. 4 the registrar has not to consider whether or not the mark is distinctive. This is an attempt to add to par. 4 the words "and not being a spelling of letters," which are not in the Act.

Sir G. Cave, S.-G., in reply. Subject to the obligation imposed by the prohibitory ss. 11 and 19, the registrar has a discretion to accept or refuse an application to register. There is no provision in the Act which compels him to register, though of course his decision is subject to appeal under s. 12. That he has a discretion is clear upon the authorities, and it is submitted that he has rightly exercised it in this case. There was no need for evidence to show that the mark was calculated to deceive. There was no such evidence in *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* (4) The Court will not give the applicant increased statutory protection. Disclaimer does not assist him in this case.

Cur. adv. vult.

(1) 15 App. Cas. 252, 256.
(2) [1898] A. C. 571.
(3) [1894] 1 Ch. 645.
(4) [1913] A. C. 624.

March 9. LORD COZENS-HARDY M.R. Mr. Garrett, the surviving member of the firm of Osborne, Garrett & Co., under which name he trades as hairdressers' sundriesman, applied to register "Ogee" as a trade mark in class 3 in respect of chemical substances prepared for use in respect of medicine and pharmacy. The registrar refused the application, but on appeal Sargant J. allowed it. The registrar now appeals to this Court.

A question of general importance was argued before us, namely, whether in a case like this the registrar has any discretion. The mark falls under s. 9, par. 4, as a word having no direct reference to the character or quality of the goods, and it is argued that the registrar is bound to accept the application unless the case falls within the terms of s. 11 or s. 19. In my opinion this contention ought not to prevail. There is no absolute right to registration of a trade mark. Sect. 12, sub-s. 2, is express: "Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications." The words are clear. The registrar must not disregard s. 9, which defines the essential particulars of a registrable trade mark, nor must he disregard the prohibitory ss. 11 and 19. But subject to these limitations he has a discretion either to refuse or to accept. This is my view apart from authority.

Eno v. *Dunn* (1) was under the old Act, but the relevant sections are for the purpose of this appeal identical with the sections in the present Act. It was a case falling within par. 4. Lord Herschell said: "I think it is enough to say that I am not satisfied that there would be no reasonable danger of the public being so deceived." That was the case of Eno's Fruit Salt. Then comes this passage: "The case was argued on behalf of the respondent as if he had an absolute right to have any trade mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. I do not so read the statute. Those sections prohibit the registration of a trade mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred.

(1) 15 App. Cas. 252, 261.

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Of course this discretion must be reasonably and not capriciously exercised; but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it."

In the "*W. & G.*" *Case* (1), which fell under s. 9, par. 5, Lord Parker in effect stated the same principle: "The trade mark legislation of 1883 and 1888 left the law unchanged so far as letter marks were concerned. These became registrable for the first time under the Act of 1905, but only if they were distinctive in the sense above referred to. There is, however, a proviso in s. 9 to the effect that in determining whether a mark is distinctive in this sense the tribunal may consider the extent to which actual user has rendered the mark in fact distinctive. But the tribunal is not bound to allow registration even if the mark be in fact distinctive. A common law mark is still not necessarily registrable." That is all I need read of that case. Even, therefore, if my own view were different, I should be bound to hold that the registrar had, and that Sargant J. had, and that we have a discretion.

It remains to consider in what way our discretion ought to be exercised in this particular case, regard being had to all the circumstances. Osborne, Garrett & Co. is an old firm. It is beyond doubt that "O.G.," the initial letters of the firm, were adopted to distinguish their goods. After a time the word "Ogee," which is a dictionary word, representing the two initial letters of the firm name, was used to distinguish their goods. Sargant J. confessed that he was not familiar with the word as an architectural word or in any other sense, and I am ready to make a like confession. In 1898 and 1903 they registered without opposition "Ogee" in different classes, and such registrations cannot now be removed. They have used the word as a trade mark on or in respect of goods included in class 3. The applicant says his goods are known and sold as "Ogee" goods, and he exhibits a number of labels and other trade documents in which "Ogee" is used, sometimes with, but more often without, the addition of his firm name; and there is trade evidence to support this. The registrar said that prima facie "Ogee" is simply the letters "O.G." spelt, and he added that letters cannot be registered as distinctive marks, and that it is clear that an application to

(1) [1913] A. C. 624, 636, 637.

register the letters " O.G." ought not to succeed. He was not laying down any general principle that no letters can be registered; he was only saying that " O.G." is no better than " W. & G." There is no misdirection. He added that the consistent rule in the Office has been also to refuse the letters when they are spelt out—at all events since the " *W. & G.*" *Case.* (1)

Sargant J. reversed the decision of the registrar, partly because he thought—wrongly as I conceive—that the registrar had misdirected himself, and partly because he thought the long user of the word and the registrations in 1898 and 1903 in other classes had made the word distinctive of the applicant's goods. This second ground deserves careful consideration, and it has caused me to hesitate; but upon the whole I think the consistent rule referred to by the registrar ought not to be departed from in this case. A trade mark appeals to the ear as well as to the eye. This has been often laid down. I need only mention the *Red Star Case.* (2) If the letters " O.G." could not be registered, it seems to me that the word " Ogee " ought not to be registered. So if " M.T." ought not to be registered, the word " empty " ought to be refused. The applicant may or may not have a right to " Ogee " as a common law mark, but it is not a registrable mark. Sargant J. required the applicant to disclaim any right by virtue of the registration to the exclusive right to the use of the letters " O.G." That disclaimer seems to me in no way to improve the applicant's position. A firm whose initials are " O. & G." would be troubled by the registration of " Ogee," and the risk of confusion on the part of the public would still exist. The registrar is an official whose constant duty is to deal with applications to register. His experience is great, and unless he has misdirected himself or acted upon a wrong principle his discretion ought not to be lightly interfered with. In my opinion Sargant J. was wrong in allowing the application. The appeal must be allowed with costs here and below.

There are three applications for registration in three different classes. The same considerations apply in each case.

PHILLIMORE L.J. In this case the registrar refused the application of Thomas William Garrett to register as a trade mark the word

(1) [1913] A. C. 624. (2) [1894] 1 Ch. 61.

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"Ogee" in classes 3, 48, and 50. The applicant appealed to the Court, and Sargant J. decided in his favour and ordered that the registrar should proceed with the registration, and the Registrar of Trade Marks has appealed to this Court.

The three applications stand together, and the registrar stated the grounds of his decision in all three together. They were substantially as follows: That since the "*W. & G.*" *Case* (1) an application to register the combination of the letters "O.G." as a trade mark ought not to succeed; that this being so, a trade mark must be distinctive both to the eye and the ear; that the word "Ogee" is simply the letters "O.G." spelt out and ought not to be registered, though it is a dictionary word. He distinguished the decision of Warrington J. (now Warrington L.J.) in the "*Vezet*" *Case* (2), and did not think that the applicant's offer to disclaim the letters "O.G." helped him; and under s. 9 of the Act, as well as in the discretion vested in the registrar, which he said he is bound to exercise in cases of this kind, he rejected the application. The argument before us may be broadly divided into two heads: Has the registrar such a discretion as he claims, and, having it, has he exercised it upon good or lawful grounds? And, secondly, if he has, this being an appeal from his discretion to the discretion of the Court, and in a hierarchy of discretions to this Court and to the House of Lords, ought this Court to do as Sargant J. has done and exercise its discretion in favour of the applicant? It was strenuously contended for the applicant that the registrar has no discretion, but only a power of adjudication or determination, or that at any rate his discretion is within such narrow and inappreciable limits that it does not apply to the present case; and, secondly, if this be not so, that in the present case his exercise of his discretion must be set aside because he has not acted upon good or legal grounds. The contention that the registrar had no discretion did not find favour with Sargant J., but he thought that he had proceeded upon wrong grounds—as he put it, "to some extent misdirected himself"—and therefore that he, Sargant J., was more free to deal with the matter, that is, to exercise his own discretion, than if it had otherwise been the case.

Under s. 9 of the Act, par. 4, "a word or words having no direct

(1) [1913] A. C. 624. (2) 22 Rep. Pat. Cas. 568.

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reference to the character or quality of the goods" with certain exceptions not material may be a registrable trade mark. So under par. 5 may be "any other distinctive mark," with, again, certain exceptions not material. The word "Ogee" is a real word. It is not an invented word to which par. 3 applies, but it is a dictionary word, though not one in very common use, and it has no direct reference to the character or quality of the goods. The applicant says that it is therefore registrable, and that the registrar has erred by importing into an application under par. 4 the condition of distinctiveness which only arises under par. 5, and which may be applicable to letters which do not come into any of the four previous classes, but is not applicable to par. 4. Or, to put it in another way, that the registrar has read into par. 4 the qualification "distinctive" which is not there. Now, s. 9 having provided for the essential particulars for a registrable trade mark, ss. 11 and 19—and perhaps others—specifically exclude certain kinds of proposed trade marks. And then s. 12, after directing the person desirous of registering to apply in writing to the registrar in the prescribed manner, proceeds as follows: "Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications." It is urged on behalf of the applicant that this means that the registrar must determine whether the application is, according to the provisions of the Act, capable or otherwise of registration, and that if it is capable he must accept, just as if incapable he must refuse, and that his duties are only those of adjudication or determination. It is also submitted that the words "subject to the provisions of this Act" govern refusal as well as acceptance. This may be so; I am not certain of the grammar, but I do not think it makes much difference. It is said for the registrar that these words mean that the registrar cannot accept any application which is not according to or is forbidden by the Act, and that he must make this inquiry first. Having determined this, he has then to see whether he shall accept or refuse, being guided in the exercise of his discretion by the principles of the Act, and not acting capriciously. The further sub-sections of s. 12 provide for the review of the action of the registrar in the event of his refusal.

In my opinion it is not open to us to do otherwise than to accept

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the registrar's view so far. The law is, I think, settled in that sense by the House of Lords. The language of Lord Herschell in the case of *Eno* v. *Dunn* (1) (the "Fruit Salt" case) is in point. I quote: "Whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised; but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it." This case was decided upon the earlier Act, but the language of the two Acts is similar. Lindley L.J., no doubt, in *In re Farbenfabriken Application* (2) seems almost to reduce the capacity to exercise a discretion to zero, but his observations were not precisely directed to the point now under consideration, and I observe that *Eno* v. *Dunn* (3), though decided in 1890, was not cited in argument or in any of the judgments. The matter seems to me put at rest by the later decision of the House of Lords in the "*W. & G.*" *Case.* (4) That was a decision on par. 5. The registrar had refused to register the letters "W" and "G" coupled by the symbol for "and" as a trade mark. Eve J. upheld him, and the Court of Appeal by a majority upheld him as to marks in block capitals, but reversed the registrar and Eve J. and allowed the alternative mark of the letters written in cursive characters with a flourish. The House of Lords agreed entirely with the registrar. The decision is important, not only as affirming the discretion of the registrar, but as indicating some guide to him in its exercise. Lord Shaw says: "It appears to me that the registrar was within his rights and performing his correct duty in looking to the particular facts of the application and in taking a wide survey of the effects of a grant, and in doing this for himself and exercising at that stage his judicial discretion." In a second passage he quoted from what he describes as "a most admirable judgment and description of the whole situation by this official," and the quotation is as follows: "This question should be asked in all such cases: Will the registration of the trade mark cause substantial difficulty or confusion in view of the rights of user by other traders?" This

(1) 15 App. Cas. 261.
(2) [1894] 1 Ch. 652.
(3) 15 App. Cas. 252.
(4) [1913] A. C. 624, 630.

second passage will be important when I come to consider a later stage of the argument. In a third passage on the same page Lord Shaw approves of some language used by Fletcher Moulton L.J. in the "*Perfection*" *Case* (1) which is to the same effect. Lord Parker, with whose judgment the other noble and learned Lords, Lord Mersey and Lord Loreburn, concurred, said (2): "But the tribunal is not bound to allow registration even if the mark be in fact distinctive. A common law mark is still not necessarily registrable." And he proceeds to indicate certain conditions for the exercise of this discretion in a passage which I will quote later. These authorities, to my mind, determine that the registrar has a discretion—that is, that he is not necessarily bound to accept an application for a trade mark if it fulfil one of the positive qualifications and does not fall under one of the positive disabilities set forth in the Act. But his discretion must be exercised upon good grounds; he must not misconstrue the Act. For this proposition the "*Solio*" *Case* (3) is in point and was rightly relied upon. Now it is said that he has misconstrued the Act by applying to par. 4 a condition which is only applicable to par. 5. Upon this point the second passage in Lord Shaw's judgment which I have already quoted and the following passage in Lord Parker's judgment seem to me material: "If the tribunal finds that a mark is anywhere, or among any class of people, in fact, distinctive of the goods of the applicant, it may be influenced by this fact in determining whether it is adapted to distinguish these goods from those of other persons, but distinctiveness in fact is not conclusive, and the extent to which the tribunal will be influenced by it must, in my opinion, depend on all the circumstances, including the area within which and the period during which such distinctiveness in fact can be predicated of the mark in question." In the "*Fruit Salt*" *Case* (4) Lord Watson said that when an applicant proposes to register a trade mark "He does not hold the same position which he would have occupied if he had been defending himself against an action for infringement." That "He is in petitorio, and must justify the registration of his trade mark by shewing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, in

(1) [1910] 1 Ch. 130.
(2) [1913] A. C. 637.
(3) [1898] A. C. 571.
(4) 15 App. Cas. 252.

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dubio, his application ought to be disallowed." Somewhat on the same principle Warrington J. held in the "*Motricine*" *Case* (1)—which was the case of an invented word under par. 3, where the word "distinctive" is not introduced—that it was not necessary for the registrar or for him to decide that the word would be calculated to mislead or deceive, that it was sufficient to say that the applicants had not made out that the use of the trade mark might not be calculated to deceive. And in so doing the learned judge relied upon the language of Lord Watson. It appears to me, therefore, that the registrar legitimately exercises his discretion when he considers, on an application made under par. 4, whether or not the mark is so distinctive that it will not only escape the prohibition of s. 11, but be in fact not likely to give occasion to confusion in the case of another trader using, as he legitimately may, his own initials. This leaves one further division of the first point to consider. In doing so, should we have regard to the ear as well as to the eye? That where a proposed trade mark consists of words descriptive of a device which has been already registered this may be a good ground for refusing registration, or even for expunging a trade mark already registered, is shown by the "*Red Star*" *Case* (2) and the "*Golden Fan*" *Case* (3), which were both decisions of this Court. Whether a word the sound of which also represents the sounds of two initials is within this principle is more disputable. In the "*Vezet*" *Case* (4), decided in 1905, it appeared that the Dutch pronunciation of the letters "V Z" would be "Ve-Zet." But in the circumstances of the case, which were somewhat special, and having regard to the fact that the sound was a Dutch and not an English one, Warrington L.J. (then Warrington J.) overruled the registrar and allowed the registration, taking a disclaimer or condition similar to that which was offered in the present case, namely, that the applicants did not claim to prevent the use of initials. I think that all that can be said upon this subject is that the similarity to the ear may always be a ground for the exercise of discretion in the direction of refusal.

Now I come to the second point which was raised before us—

(1) [1907] 2 Ch. 435.
(2) [1894] 2 Ch. 26; 11 Rep. Pat. Cas. 142.
(3) [1896] 2 Ch. 137; 13 Rep. Pat. Cas. 288.
(4) 22 Rep. Pat. Cas. 568.

whether in the exercise of our discretion we should allow this application for registration to proceed. The case is a very special one. There are few words which correspond with special initials. There are more combinations of words which would correspond. Thus, "Double you and gee," "Double you and see," or some sentences with the pronoun "I," such as "I see," might be treated indifferently as words or as the spelling out of initials. I do not think that it ought to matter that the word happens to correspond with the initials of the applicant's firm. If his firm had been "Smith & Robinson" the same conditions ought, I think, to apply. No doubt the fact that the word does spell the initials of the applicant's firm may have opened the eyes of the registrar; still I think that is immaterial. I have been in considerable doubt on this question of discretion. The applicant's word is a real though rare word. He has the judgment of Sargant J. in his favour, and he has had this very trade mark registered in other classes. On the other hand, this is a matter of practical experience where the judgment of the registrar is of great weight. It is a mistake, I think, of Sargant J. to say that the registrar had misdirected himself. On the whole I rather submit myself in this matter to the judgment of the other members of the Court who have greater experience in these cases, and I concur with them in allowing this appeal.

WARRINGTON L.J. This is an appeal by the Registrar of Trade Marks from an order of Sargant J. directing him to proceed with an application of Thomas William Garrett, trading as Osborne, Garrett & Co.

The applicant, who carries on business under the above-mentioned name as a hairdressers' sundriesman, desires to register in three classes the word "Ogee." This word has already been registered as his trade mark in certain other classes and has been used by him for a considerable number of years upon or in connection with all the goods in which he trades, and there is evidence that the public know his goods by the name "Ogee."

The registrar refused to proceed with the application on two grounds—first, that in his opinion the mark is not distinctive, and, secondly, in the exercise of his discretion.

The word "Ogee" is a dictionary word and is used as descriptive

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of particular mouldings in architecture and carpentry and of arches and tracery having a double curve. It is derived from the French "ogive." It is sometimes written "O.G." or "O G" without the points. In sound it is identical with the letters "O.G." and in writing it represents those letters. I have no doubt the applicant and his late partner Osborne adopted it as representing the initials of their two names. The applicant claims to register the word under par. 4 of s. 9 as a word having no distinct reference to the character or quality of the goods, and he contends that he is entitled to have it registered unless it is open to an objection founded on s. 11 or on s. 19. It is not suggested that it is open to any objection under s. 19. I will assume for the moment that it is not calculated to deceive and is therefore not open to an objection under s. 11. I agree with the applicant that on this assumption the mark is registrable and that, coming as it does under par. 4, no question arises as to whether it is distinctive or not. But, though registrable, is it one which the registrar is bound to register? This raises the question as to the extent of the discretion given to the registrar under s. 12, sub-s. 2, which is in these terms: "Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications."

The applicant contends that if a mark is found to be registrable and is not open to any of the objections referred to above the registrar has no longer any discretion. To accede to this argument would, I think, be to hold that the registrar has no discretion, because in determining whether a mark is registrable and whether it is open or not to any of the statutory objections the registrar is exercising the function of adjudication and is not exercising a discretion. That he has a right to exercise discretion as distinct from the function of adjudication is, I think, apparent on the words of the statute and is clearly settled by authority. I refer particularly to the passage in the speech of Lord Herschell in *Eno* v. *Dunn* (1), which was read so often in the course of the arguments, and to the speeches of Lord Shaw and Lord Parker in *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* (2), and particularly to the passage in Lord Parker's speech, where he says "The tribunal is not bound

(1) 15 App. Cas. 252, 261. (2) [1913] A. C. 624, 637.

to allow registration even if the mark be in fact distinctive." It is said that in the "*W. & G.*" *Case* (1) the mark—the letters "W. G." —was registrable, if at all, only under par. 5, and that the judgments must be read in reference to this fact; but in my opinion this fact makes no difference, for once it is decided, as a matter for adjudication, that the mark is distinctive, there is no distinction between a mark coming under par. 5 and one coming under one of the earlier paragraphs.

I am of opinion, therefore, that the registrar has a discretion as distinct from the power of adjudication. I do not think that Lindley L.J. in his judgment in the "*Somatose*" *Case* (2) intended to express a different view, but if he did, I think his judgment is inconsistent with the views expressed by the members of the House of Lords whose speeches are referred to above.

But of course the discretion is a judicial discretion and must be exercised on reasonable grounds and not capriciously. The matter being now before the Court, the discretion is to be exercised by the Court. Are there, then, sufficient grounds for refusing the application? I think there are. If the application was for the registration of the letters "O.G." it would plainly fail on the authority of the "*W. & G.*" *Case* (1), referred to above. The word, though at the same time a dictionary word, represents the letters written out. Moreover, in considering questions of possibility of confusion or of deception regard must be had to sound as well as to sight, and the pronunciation of the word and of the letters is the same. If the goods of some one with the same initials were to be sold with the letters "O.G." upon them, persons asking for their goods as "O.G." might well obtain the plaintiff's goods and vice versa. The disclaimer of the right to use the letters themselves as a mark does not meet the case. It is from the sound that the possible confusion may arise. The application is in fact an attempt to use in another form initials which could not themselves be used, and I think it ought to fail.

I prefer to put the case on the exercise of discretion, but I am not satisfied that the mark might not be held to be calculated to deceive and thus open to an objection under s. 11.

As to the existing registrations of the word, I think that if, in the

(1) [1913] A. C. 624. (2) [1894] 1 Ch. 652; 11 Rep. Pat. Cas. 88.

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present state of the authorities, the Court is satisfied that a mark ought not to be registered it should not be deterred from acting on that view by the fact that the same mark has at another time been admitted to registration.

I think, therefore, that the appeal ought to be allowed.

Solicitors : *The Solicitor to the Board of Trade ; Leader, Plunkett & Leader.*

G. A. S.

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[1916 W. 135.]

Mortgage—Foreclosure Action—Date of Accruer of Right to bring Action — "Other future estate or interest" — Lease of Property prior to Mortgage—Rent paid in advance—Receiver—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3—*Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2, 8.

In 1897 freehold property was mortgaged in fee simple to secure certain moneys payable on demand, but there was no covenant by the mortgagor for payment. At the date of the mortgage the property was subject to a lease for twenty-one years from July 29, 1896. The yearly rent of 50*l.* had been paid in advance for seventeen and a half years upon the execution of the lease, and no quarter's rent became due until January 29, 1914. After July, 1903, no payment was made or acknowledgment given in respect of the mortgage. On January 15, 1916, the mortgagees commenced foreclosure proceedings :—

Held, reversing the decision of Eve J., that the estate claimed by the mortgagees was not "an estate or interest in reversion or remainder, or other future estate or interest," within the meaning of those terms as used in s. 3 of the Real Property Limitation Act, 1833, but was a present estate in fee simple, and none the less an estate in possession because it was subject to an occupation lease ; that the mortgagees' right to bring an action first accrued immediately upon the execution of the mortgage ; and that, as more than twelve years had elapsed since the last acknowledgment, their right of action was barred.

Inasmuch as the object of a foreclosure action is not to obtain the payment of rent but to deprive the mortgagor of his right to redeem the fact that the mortgagee will not by bringing his action

derive any immediate pecuniary benefit from the rents and profits —because, for instance, the rent is a peppercorn or has been paid in advance—will not prevent time from running under the statute. *Samuel Johnson & Sons* v. *Brock* [1907] 2 Ch. 533 approved.

APPEAL from an order of Eve J. appointing a receiver upon motion by the plaintiffs as mortgagees in a foreclosure action.

The mortgage, dated October 14, 1897, comprised certain property belonging to the defendant and other property belonging to her husband and was given by them to secure his current account with the plaintiff bank, and the moneys secured by the mortgage were payable on demand. The mortgage deed contained no covenant for payment by the defendant and was an ordinary mortgage of her property to the plaintiffs in fee simple, being expressed to be made subject to a mortgage dated February 19, 1895, by the defendant to a brewery company to secure the sum of 700*l.* and interest.

The plaintiffs subsequently discovered that on August 17, 1896, the defendant had granted a lease of her property to the brewery company for twenty-one years from July 29, 1896, at a yearly rent of 50*l.*, the first seventeen and a half years' rent, amounting to 875*l.*, being paid on the execution of the lease and the remainder of the rent being payable quarterly, the first quarterly payment to be made on January 29, 1914. The mortgage to the brewery company was paid off out of the 875*l.*, but no reconveyance was taken, the mortgage, as the defendant alleged, being kept alive in her favour. The lease contained usual lessees' covenants and gave the defendant a right of re-entry on breach. The brewery company had remained in possession of the premises since the date of the lease and had paid the yearly rent of 50*l.* to the defendant since January 29, 1914.

The husband became bankrupt in November, 1897, and on July 4, 1903, the plaintiffs realized his property comprised in the mortgage of October 14, 1897, and applied the proceeds towards payment of what was due upon the mortgage, but a sum of 639*l.* still remained owing. Since that date no further payment had been made and no acknowledgment given.

On January 15, 1916, the plaintiffs took out a summons against the defendant for foreclosure, and their subsequent motion for a receiver was resisted by the defendant on the ground that the plaintiffs' claim was barred by the operation of the Statutes of

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Limitation. Eve J. was of opinion that the case came within the penultimate provision of s. 3 of the Real Property Limitation Act, 1833, relating to " an estate or interest in reversion or remainder or other future estate or interest," and held that the lapse of time was no bar to the action and appointed a receiver.

The defendant appealed.

Roope Reeve, for the appellant. This case falls within that part of s. 3 of the Real Property Limitation Act, 1833, which provides that when the claimant of any land claims in respect of an estate or interest granted or assured to him by any instrument (other than a will) by a person being, in respect of the same estate or interest, in possession or receipt of the profits of the land, and no person entitled under such instrument has been in such possession or receipt, then the right of the claimant shall be deemed to have first accrued at the time when he or the person through whom he claims became entitled to such possession or receipt by virtue of the instrument.

Eve J. attached too much importance to the fact that actual physical possession could not be had during the first seventeen and a half years of the lease, and thought that by reason of the lease the estate claimed by the plaintiffs was reversionary during those years and that upon their determination a new sort of estate arose, with the result that he applied that part of s. 3 which deals with future estates. That question was considered by Parker J. in *Samuel Johnson & Sons* v. *Brock*. (1) It is clear that the possession of the brewery company under the lease did not render the mortgagor's interest a future interest within the latter part of s. 3 or suspend the running of the statutory period. Romer J. pointed out in *Kibble* v. *Fairthorne* (2) that the test is, not whether actual physical possession can be had, but whether there could have been foreclosure proceedings. The mortgage debt being payable on demand, the statutory period began to run from the date of the execution of the mortgage, and the bank not having taken foreclosure proceedings for twelve years since that date is barred and its charge is gone.

Maugham, K.C., and *H. M. Humphry*, for the respondents. This case turns substantially upon s. 1 of the Real Property Limitation Act, 1874, rather than upon s. 3 of the earlier Act; the action is

(1) [1907] 2 Ch. 533. (2) [1895] 1 Ch. 219, 225.

"an action or suit to recover land" within s. 1, and nothing has happened to make time run under it. The mortgagor was not in actual receipt of the rents when the mortgage was made, and did not become entitled to receive the rents until January, 1914, when the seventeen and a half years determined, and she received some rent, showing that she was then mortgagor in possession and producing something against which the bank could proceed. If the bank had brought an action in the interval it would not have been an action to recover land within the meaning of s. 1.

Further, we submit that the mortgaged estate was an estate or interest in reversion or remainder within s. 3 of the Act of 1833. The part of that section which relates to alienation does not apply to this case, because the grantor or mortgagor was not in the possession or receipt of the profits of the land, which, as Lord St. Leonards pointed out, denote, not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land: Sugden's Real Property Statutes, 2nd ed. p. 47. But this case falls within that part of s. 3 which relates to future estates. What was mortgaged to the bank was the reversion on the lease.

[WARRINGTON L.J. Has it ever been held that under s. 3 property let to a tenant under an occupation lease is not an estate in possession?]

There is no decision to that effect as between mortgagor and mortgagee, but it has been so held as between landlord and tenant: *Doe* v. *Oxenham* (1), where it was decided that the reversion on a lease was a reversion within s. 3. During the term the bank has no effective right of entry or action for the recovery of the land: *Warren* v. *Murray* (2); but at the end of the term the bank as owner of the reversion is entitled to enter and get possession as against the tenant, and if against the tenant, why not also against the mortgagor whose assign the bank is? Until the end of the seventeen and a half years there was no necessity for the mortgagees to move, and no foreclosure action during that period would have helped them.

In support of our argument and as part of it we desire to adopt the following statement of the law on p. 458 of Darby and Bosanquet's Statutes of Limitations, 2nd ed.: "If the mortgagor

(1) (1840) 7 M. & W. 131. (2) [1894] 2 Q. B. 648.

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be himself out of possession at the date of the mortgage, whether the property be in the occupation of a tenant or of some one holding without a title, it would seem clear that the period of limitation must, as against the mortgagee, be calculated from the time at which, if no mortgage had been executed, the statute would begin to run against the title of the mortgagor, or those through whom he claims; that is, from the time at which, according to the 3rd and following sections of 3 & 4 Will. 4, c. 27, the right of entry or action is in the circumstances of each case deemed to have first accrued." That is directly in point. This property being reversionary, time will not run against the mortgagees until it falls into possession, and foreclosure being for the purposes of the statute regarded as a mode of recovering possession of land is not effective so long as the mortgaged interest is future, and the mortgagees can therefore bring foreclosure within twelve years after the interest falls into possession: *Hugill* v. *Wilkinson* (1); *In re Conlan's Estate* (2); Lightwood's Time Limit on Actions, p. 87.

Samuel Johnson & Sons v. *Brock* (3) was a case between first and second mortgagees and was altogether different from this. We submit that Eve J. was right in holding that this case came within the last clause but one of s. 3. That section is not exhaustive: see Lord Cairns in *Pugh* v. *Heath* (4); but the part of it dealing with a reversion comes nearest to the present case.

Roope Reeve in reply.

Cur. adv. vult.

March 8. LORD COZENS-HARDY M.R. By a deed dated October 14, 1897, the defendant, then a married woman, mortgaged a dwelling-house and shop in Ryhill to the plaintiff bank to secure her husband's banking account. Her husband by the same deed mortgaged some property of his own. There was not any covenant to pay by her. Her husband became bankrupt in November, 1897. In 1903 the bank sold his property and applied the purchase-money in reduction of the debt owing on his account. Upwards of 600*l.* was still due. Since July, 1903, nothing has been paid in respect of the mortgage debt, and there has been no acknowledgment of the

(1) (1888) 38 Ch. D. 480.
(2) (1892) 29 L. R. Ir. 199.
(3) [1907] 2 Ch. 533.
(4) (1882) 7 App. Cas. 235, 238.

bank's title by the defendant. On January 15, 1916, a summons for foreclosure was issued, and it was followed by a motion for a receiver. The defendant objected that the bank's title was barred by the Statute of Limitations. Eve J. overruled the objection and appointed a receiver.

Upon the facts which I have thus far stated it seems clear that the statute is a bar. The bank's right to bring a foreclosure action arose before July, 1903, though it is sufficient to accept that date. The mortgage was of the fee simple in possession.

But it has been argued that the existence unknown to the bank of a prior lease by Mrs. Yates dated August 17, 1896, to a brewery company for twenty-one years at a rent of 50*l.* makes all the difference, because there is an unusual provision in the lease that the first seventeen and a half years' rent (amounting to 875*l.*) had been paid at the date of the lease. The result was that the rent of 50*l.* could not be recovered by Mrs. Yates or by the bank before January 29, 1914, so that the statute did not begin to run until January, 1914, or will not begin to run until July 29, 1917, when the term of twenty-one years ends. I am unable to accept this contention. Sect. 3 of 3 & 4 Will. 4, c. 27, draws a plain distinction between an estate in possession and an estate in reversion or remainder. These are well-understood terms in real property law. [His Lordship read shortly the material parts of s. 3 and continued :] An estate in fee simple, though subject to a lease, is an estate in possession, and not an estate in reversion or remainder. To quote the words of Mr. Challis in his Law of Real Property, 3rd ed. p. 100, "During the continuance of a prior term, the first estate of freehold is properly described, not as being a remainder of freehold expectant upon the term of years, but as being the freehold in possession subject to the term. . . . . A prior term of years does not prevent a subsequent vested estate of freehold from being an estate of freehold in possession." Moreover, the section speaks of the estate "claimed," and it is certain that the estate "claimed" by the bank was the fee simple in possession.

It is impossible to hold that the statute does not begin to run except where the grantee is in actual occupation. Nor can it make any difference that the rent reserved is only a peppercorn, or that after July, 1903, the bank would not be in a position to

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derive any immediate pecuniary benefit from rents and profits. The object of foreclosure is to destroy the mortgagor's right to redeem, and it is only as an incident that the right to receive rents and profits arises. If authority is required, I think Parker J.'s judgment in *Samuel Johnson & Sons* v. *Brock* (1) may be referred to.

I think the appeal must be allowed with costs. If, as is probable, the parties desire to put an end to the action, this may be treated as the trial and the action dismissed with costs.

PHILLIMORE L.J. The short facts of this case have been stated by the Master of the Rolls. On January 15, 1916, the plaintiff bank took out an originating summons to foreclose its mortgage. A motion was then made for a receiver, which was resisted by the defendant, Mrs. Yates, on the ground that the bank's claim was barred by the Real Property Limitation Act, 1874. The point between the parties was very conveniently tried on the motion, and Eve J. having given judgment for the bank, Mrs. Yates has appealed. The point to be determined rests upon the true construction of s. 3 of the Real Property Limitation Act, 1833, read in connection with s. 1 of the Real Property Limitation Act, 1874.

In support of the order made by Eve J. it was contended before us that the case was governed by the penultimate provision in s. 3, that this property was in reversion, or was a future estate or interest, and that when a reversion is being sued for time does not run till the reversion comes into possession. But the bank seeking to foreclose its mortgage is not seeking to recover the reversion expectant on the termination of the lease. No such interest was carved out and mortgaged to the bank. What was mortgaged was the fee simple, and that is what the bank is seeking to foreclose. This penultimate provision is for cases where the reversion has been severed from the particular estate and the reversioner alone is suing.

The decision of Eve J. rested, I think, upon the very peculiar arrangement by which the seventeen and a half years' rent was paid in advance. He apparently thought that during these seventeen and a half years the lessor could not be said to be in possession or in receipt of the profits. I do not quite know whether he thought

(1) [1907] 2 Ch. 533.

that in the special circumstances the mortgage to the bank was to be looked at as if it was only a mortgage of the reversion. But this point is really open to the same answer. Mrs. Yates mortgaged the fee simple. True, there were not all the usual benefits attaching to ownership of the fee simple. There was only a deferred rent. But the lessor had from the first the benefit of all the covenants (and there were several) in the lease, and the right of re-entry upon breach.

No doubt the bank, if it took proceedings to foreclose, would get no rent till the seventeen and a half years had run. None the less, from the time that the default clause in the mortgage came into operation time under the Limitation Act began to run, and if the bank intended to preserve its rights as mortgagee, it should (as it could) have taken timely proceedings to foreclose. The special circumstances on which reliance is placed do not make this an action to foreclose the reversion, and the case does not fall under the penultimate provision in s. 3, but is an ordinary case governed by the first provision in the section. The only possible interruption to the efflux of time was when the bank realized the husband's property. Since then, at any rate, there has been no payment or acknowledgment, and the period of twelve years had expired before writ.

I am of opinion that the order of Eve J. was wrong and that this appeal should be allowed.

Warrington L.J. This is an action for foreclosure which is an action for recovery of land within the Real Property Limitation Acts. The defendant pleads those statutes. Eve J. has rejected the plea and has appointed a receiver of the rents and profits of the mortgaged hereditaments. The defendant appeals.

The mortgage is dated October 14, 1897, and is an ordinary mortgage in fee, the mortgagor not covenanting to pay, for the debt was not hers, but her husband's. The bare legal estate was outstanding, but this makes no difference to the rights of the parties. The mortgage comprised property belonging to the debtor himself. This was sold on July 4, 1903, and the proceeds received by the mortgagee. Since then nothing has been paid and there has been no acknowledgment. The action was commenced on

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January 15, 1916. At the date of the mortgage the property was, and is still, subject to a lease dated August 17, 1896, for a term of twenty-one years from July 29, 1896. That lease reserved an annual rent of 50*l.*, the rent for the first seventeen years and a half to be paid on the execution of the lease. This was done.

Sect. 1 of the Real Property Limitation Act, 1874, provides that no person shall bring an action to recover any land but within twelve years next after the time at which the right to bring such action shall have accrued to him.

The action in the present case is an action of foreclosure, and the effect of the judgment when obtained is finally to deprive the mortgagor of the right which he has in equity to redeem his property on payment notwithstanding that the period fixed for this by the mortgage has expired. The right to bring this action accrues at the expiration of the last-mentioned period. In the present case there is no such period, for the money is payable on demand, and the right accrued immediately on the execution of the deed.

Prima facie, then, an action could not be brought more than twelve years after that date, but the period is lengthened in the cases to which they are applicable by the provisions which make acknowledgment or payment the starting point of the period of limitation. Under these provisions the twelve years in the present case began to run on July 4, 1903.

There is a further provision in the Act of 1833, s. 3, to the effect that where the estate claimed is an estate or interest in reversion or remainder or other future estate or interest the right shall be deemed to have first accrued when it became an estate in possession. The plaintiffs insist that this is applicable to the present case and that the period has therefore not yet begun to run.

In my opinion the estate claimed in the present case is not an estate or interest in reversion or remainder or any other future estate. It is a present estate in fee simple. I think it is quite clear that for the purposes of this statute an estate in fee simple subject to an occupation lease is an estate in possession, and the plaintiffs are unable to refer to any case supporting the contrary view. The provision contained in s. 3, therefore, will not help the plaintiffs, and there is nothing else in any of the statutes which extends the period.

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The fact that rent under the lease has been paid in advance and that no rent is at present payable is in my opinion irrelevant. The object of foreclosure is not to obtain payment of rent—the mortgagee can get that without action—but to destroy the right of the mortgagor and obtain the absolute interest in the property. The question does not turn on whether it was worth while to bring the action earlier, but whether the mortgagee was entitled to do so: *Samuel Johnson & Sons* v. *Brock.* (1)

I think the appeal ought to succeed, and the order appealed from must be discharged.

Solicitors: *Corbin, Greener & Cook, for Basil S. Briggs, Wakefield; Torr & Co., for Stewart & Chalker, Wakefield.*

R. M.

SARGANT J.
1915
Dec. 8.

In re RAY.
CANT *v.* JOHNSTONE.

[1915 R. 794.]

Will—Misdescription of Legatee—Parol Extrinsic Evidence.

A testatrix gave "No. 83 Cambridge Road to my great nephew Frederick Johnson." In an earlier part of her will she had given another house "to my great nephew Richard Johnson." She had no relations of the name of "Johnson," but had a niece Elizabeth Johnstone, who had three sons, Robert William Johnstone, Joseph Francomb Johnstone (known as "Frank"), and Richard Johnstone:—

Held, that extrinsic evidence was admissible to show the intention of the testatrix that Joseph Francomb Johnstone was the person to take No. 83, Cambridge Road.

Elizabeth Ray, widow, by her will, dated April 17, 1913, appointed C. R. Cant and J. W. Barrow her executors and gave them 50*l.* each. After containing a direction that all the just debts and funeral and testamentary expenses of the testatrix should be

(1) [1907] 2 Ch. 533.

SARGANT J. paid as soon as conveniently might be after her decease, the will proceeded and concluded as follows :—

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"I give and bequeath

"No. 29, Hartington Road, Southend, to my niece Elizabeth Johnson and 20*l.*

"No. 35, Hartington Road, to my great nephew Richard Johnson.

"No. 81, Hartington Road, to my great niece Millie Johnson.

"No. 33, Hartington Road, to my great niece Elizabeth Ashborn.

"No. 83, Cambridge Road, to my great nephew Frederick Johnson.

"No. 6, Clifftown Parade, to be equally divided between my great niece Kathleen Johnson and my great nephew Walter Northmoore.

"Forest Villa, No. Hartington Road, to Minnie Ray, and she is to pay Louisa Wakeling and Maria Ray one shilling each weekly for their life from the rent of it. The money owing to me by Maria Ray not to be called in for eight years after my death, then divided between Minnie and Lillie Ray.

"The residue to be equally divided between all my relations. No. 31, Hartington Road, to Louisa Staines for her lifetime, then to come back to the estate."

Testatrix died in December, 1914, and her will was proved by the two executors in February, 1915.

According to an affidavit of the executors in support of the summons below mentioned, the will was on a printed form, such as is usually obtained from stationers, and was filled in in the handwriting of Minnie Ray on instructions from the testatrix. The will contained several mistakes in the spelling of beneficiaries' names; e.g., "Johnson" should have been spelt "Johnstone," "Ashborn" should have been spelt "Ashborne," and "Northmoore" should have been spelt "Northmore."

The testatrix never had a great-nephew with the name "Frederick Johnson," but she had three great-nephews with the surname "Johnstone" (all sons of a niece of the testatrix, called Elizabeth Johnstone)—namely, Robert William Johnstone, Joseph Francomb Johnstone (who was known as "Frank"), and Richard Johnstone. The only relatives capable of taking, if the testatrix had died intestate, under the Statutes of Distribution, were the niece Elizabeth Johnstone and a nephew Walter Northmore. There were also

several nieces and great-nephews and great-nieces of the deceased husband of the testatrix, and Minnie Ray was one of these great-nieces.

The executors took out an originating summons against Elizabeth Johnstone, wife of Joseph Francomb Johnstone (niece of testatrix), Joseph Francomb Johnstone the younger (great-nephew of testatrix), and Walter Northmore, Louisa Jane Wakeling, and Harry Charles Wakeling (all claiming to be beneficially interested under the will), raising the questions (1.) whether Joseph Francomb Johnstone (the great-nephew) or any and which other person was the legatee meant and intended by the testatrix under the description "Frederick Johnson," and (2.) whether under the will the class of persons meant and intended under the description "all my relations" was confined to persons taking the personal estate of the testatrix under the Statutes of Distribution if she had died intestate, or included any and what other persons related to or connected with the testatrix by affinity or marriage, and whether those, if any, so included took per stirpes or per capita and in what shares and proportions respectively.

Fairfax Luxmoore, for the plaintiffs, stated the facts and the questions for decision.

S. C. Leech, for Joseph Francomb Johnstone (the great-nephew). The gift of 83, Cambridge Road to "my great nephew Frederick Johnson" was meant to give the house to the great-nephew Joseph Francomb Johnstone; but if there is any doubt as to this, it can be cleared up by evidence showing that the testatrix's intention was to give the house to him. Such evidence is admissible. When the description in the will of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator: Wigram on Extrinsic Evidence, 3rd ed. p. 160; 5th ed. p. 173; *Doe* v. *Hiscocks*. (1) In Vaughan Hawkins on Wills, 1st ed. p. 9, *Doe* v. *Hiscocks* (1) and *Miller* v. *Travers* (2) are cited in support of the proposition that "parol evidence to show what were the actual testamentary intentions of the testator (such as the instructions given for the will, memoranda, or declarations by the testator

(1) (1839) 5 M. & W. 363. (2) (1832) 8 Bing. 244.

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as to what he had done or meant to do by his will, &c.) is admissible," but only "to determine which of several persons or things was intended under an equivocal description." The true effect of *Doe* v. *Hiscocks* (1) and *Miller* v. *Travers* (2) is stated in Mr. Vaughan Hawkins' MS. note referred to at p. 17 of 2nd ed. of Hawkins on Wills. [He also referred to *Bennett* v. *Marshall*. (3)]

Hildyard, for Elizabeth Johnstone. There is not enough, without the evidence proposed to be given, to show who was intended to take under the gift to Frederick Johnson. That evidence is inadmissible here. *Doe* v. *Hiscocks* (1) is in my favour, for it lays down (4) that evidence of intention can only be admitted where the meaning of the words is neither ambiguous nor obscure and the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of two or more things or two or more persons, "each answering the words in the will," the testator intended to express. In *Charter* v. *Charter* (5) Lord Chelmsford says: "It is only where in a written instrument the description of the person or thing intended is applicable, with legal certainty, to each of several subjects that extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the testator." In *In re Taylor* (6) Cotton L.J. says: "Evidence of the testatrix's expression of intention before and after the making of the will is not admissible. Such evidence of intention is only admissible where the words are equally applicable to two or more persons, which is not the case here, where the words are not strictly applicable to any person."

Roland Burrows, for the defendant Walter Northmore.

SARGANT J. The first question which arises here is whether direct evidence is admissible of the intention of the testatrix as to who was to take under a gift of "No. 83 Cambridge Road to my great nephew Frederick Johnson." There is a previous gift in the will to "my great nephew Richard Johnson," and that, on the face of it, is a perfectly unequivocal gift. The testatrix had

(1) 5 M. & W. 363.
(2) 8 Bing. 244.
(3) (1856) 2 K. & J. 740.
(4) 5 M. & W. 368.
(5) (1874) L. R. 7 H. L. 364, 370.
(6) (1886) 34 Ch. D. 255, 258.

a niece called Elizabeth Johnstone, who had three sons, namely, Richard Johnstone,—obviously the great-nephew "Richard Johnson" denoted by the previous gift—Robert William Johnstone, who is not referred to in the will, and Joseph Francomb Johnstone. As I understand it, the evidence of intention which is sought to be put in is that the testatrix meant to give 83, Cambridge Road to Joseph Francomb Johnstone.

The general rule is quite clear that extrinsic evidence of a testator's intention is only admissible to identify the subject-matter or the person with the description in the will where that description is equivocal, that is equally applicable to two or more subject-matters, or two or more persons claiming to take. There is no doubt about the rule when the description is perfectly applicable to two or more persons—for instance, where the gift is to "my nephew John Smith," and there are two or more nephews each of whom is called "John Smith"; that is admitted.

But then arises the question whether the evidence as to intention is admissible when the description in the will is equally applicable to two or more persons but imperfectly descriptive of each of them. For instance, if there were two sons of Elizabeth Johnstone, each with the Christian name of "Frederick," would the fact that the surname was misspelt prevent the Court from receiving evidence as to which of the two the description was meant to apply to? In my opinion the evidence would be admissible.

The question is dealt with at p. 17 of the second edition of Hawkins on Wills, where the following passage, from a manuscript note of Mr. Hawkins, is quoted: "If part of the description applies to no subject or object, it may be rejected, leaving the remainder an equivocal description; as a devise to John Thomas Smith, there being two John Smiths and no Thomas Smith (*Doe* v. *Hiscocks* (1)). But what is left must be enough to describe with legal certainty either of the competing persons or things, if the other does not exist (*Miller* v. *Travers* (2))." The net result of the two cases cited is accurately summed up in that note. Then in *Charter* v. *Charter* (3) Lord Cairns L.C.—referring to parol evidence of statements of the testator, as to whom he intended to benefit, or supposed he had

(1) 5 M. & W. 363. (2) 8 Bing. 244.
(3) L. R. 7 H. L. 364, 377.

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benefited by his will—says: "The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things." That language is very carefully chosen by Lord Cairns. The word used by him is "equally," not "completely." Here the description of the legatee, viz., "my great nephew, Frederick Johnson," is equally applicable in all its parts to "Robert William Johnstone" and to "Joseph Francomb Johnstone," though not completely applicable to either of them. And with reference to the latter part of Mr. Hawkins' note, it is clear that if Mrs. Johnstone had had only one son besides Richard, then, whether that other son had been called Tom or Dick, the description of "my great nephew" in the will would have been sufficient, if there was no other family of Johnstone or Johnson or a like name related to the testatrix. The evidence of intention must, therefore, be admitted.

After this judgment an affidavit of Minnie Ray was read. She deposed that she obtained a form of will for the testatrix from a firm of stationers, and went through the form with the testatrix. The deponent then stated what the testatrix had said to her about the executors and the houses and other benefits to go to Elizabeth Johnstone and others, and that the deponent had to search among the testatrix's letters to ascertain the names of her relatives and to find her pass-book. As regarded 83, Cambridge Road deponent said: "Deceased asked whether I thought the back of 83, Cambridge Road would not make a good barber's shop. She had often asked me this before. The back of 83, Cambridge Road runs up to another road called Scratton Road. She said she thought it would, and she wished to leave it to her great-nephew the barber. I did not know the proper christian name of this great-nephew, and thought the deceased said 'Fred Johnstone.' She may have said 'Frank' and I misunderstood her, but I am sure that the house was meant to go to her great-nephew whom I now know as Joseph Francomb Johnstone. I knew he was the only barber there was in the family."

SARGANT J. held that the defendant Joseph Francomb Johnstone was the legatee meant and intended by the testatrix under the

description "Frederick Johnson" contained in the will; and on the second question he held that, under the gift to "all my relations," the residue of the estate was divisible, in the events which had happened, between the defendants Elizabeth Johnstone and Walter Northmore, the next of kin of the testatrix at the time of her death.

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Solicitors for all parties: *C. R. Sawyer & Withall, for H. J. Jefferies & Co., Southend-on-Sea.*

F. E.

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[1915 C. 3164.]

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Will—Perpetuity—Rule in Whitby *v.* Mitchell—*Equitable Limitations—Trust to convey—Settlement of Equitable Estate in Remainder or Expectancy — Testamentary Appointment — Conversion — Date for ascertaining Real Estate within Rule.*

The rule in *Whitby* v. *Mitchell* (1890) 44 Ch. D. 85, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of that unborn person, applies to any settlement of a fee simple estate, whether legal or equitable, and whether in possession, remainder, or expectancy.

For the purposes of this rule there is no difference between freehold and copyhold estate.

Where a settlement of real estate contains a power to the trustees to convert the real estate and gives a special power of appointment over the property, in considering the application of the rule the nature and quality of the property must be regarded as at the time when the appointment becomes operative and not as at the date of the settlement by which the power is given.

By a settlement dated in 1861 freehold lands were conveyed by A. to a trustee in fee upon trust to pay the net income to A. for life, and after his death upon trust to pay out of the said income an annuity, and subject thereto upon trust to convey the estate as A. should by will appoint. A., who died in 1887, by his will appointed the lands to trustees, upon certain trusts by way of settlement:—

Held, following *Tatham* v. *Vernon* (1861) 29 Beav. 604, that in 1893, when the annuitant was still living and the lands were

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still vested in the original trustee, the beneficiaries under A.'s will had nevertheless equitable estates in the lands, and not merely equitable executory interests.

ADJOURNED SUMMONS.

By a settlement dated June 15, 1861, John Graham Smith assured and covenanted to surrender unto Charles James Graham certain freehold, copyhold, and leasehold hereditaments and certain funds of pure personalty, to hold upon trust to pay the net annual income arising therefrom to the settlor during his life, and after his decease upon trust to pay out of the same net annual income the annual sum of 1000*l.* to the settlor's wife, Annie Smith, during her life, and subject thereto, in the event which happened of Annie Smith surviving her husband, "upon trust to convey, assign, and dispose of the said trust estate" in such manner as the said John Graham Smith should by his last will and testament or any codicil thereto give, direct, or appoint. The settlement conferred upon the trustee a power to sell the real estate comprised in it and to apply the money to arise from any such sale either in the discharge of any mortgage or incumbrance upon the trust estate or to invest such money in the public stocks or funds or in the purchase or on mortgage of any freehold, copyhold, or leasehold hereditaments in England or Wales.

J. G. Smith died on July 25, 1887, having by his will dated May 15, 1876, with two codicils dated respectively April 8, 1880, and March 2, 1883, appointed the settled property, together with his own unsettled property, to the same C. J. Graham and H. G. Smith, upon trusts under which, subject to the payment of the annuity of 1000*l.* to Mrs. Annie Smith reserved by the settlement and an annuity of 300*l.* bequeathed by his second codicil, the entire property was to be held as to one moiety upon trust to pay the income to the testator's sister, Mrs. Mary Ann Wilson, during her life, and after her death upon trust for all her children who should attain the age of twenty-one years equally, and as to the other moiety to pay the income to Lady Whitmore, another sister of the testator, during her life, and after her death upon trust for all her children who should attain the age of twenty-one years equally, and, in default of any such child, upon trust to pay the income of that second moiety to Mrs. Wilson during her life, and after her death upon trust for

all her children who should attain the age of twenty-one years equally.

A question having arisen in 1888 whether during the lifetime of Mrs. Annie Smith the settled property should be retained by the trustee of the settlement of 1861 and the trusts executed by him, or whether the settled property, subject to the annuity, should not be conveyed to the trustees of the will, Stirling J., by an order dated June 16, 1888, declared that, notwithstanding the provisions contained in the will and codicils of the testator, J. G. Smith, the defendant C. J. Graham, as the trustee of the settlement of 1861, was entitled, so long as the annual sum of 1000*l.* by the said indenture secured upon trust for the said Mrs. Annie Smith should be payable, to continue in possession and to receive and manage the hereditaments, estates, and property comprised in and assured by the said indenture and execute the trusts thereof, but that, after paying out of the rents, issues, profits, and income of the said trust estate all outgoings and expenses incident or relating thereto or incurred in respect thereof and all interest from time to time accruing due upon the mortgages and so forth, the said C. J. Graham ought to account half-yearly, as such trustee of the said indenture, to the plaintiff and himself, as the executors and trustees of the will and codicil of the said testator, in respect of the rents, issues, profits, and income and of such payments as aforesaid and any surplus remaining thereafter, but the said defendant was to be at liberty, with the consent of Mrs. Wilson and Lady Whitmore, to pay their respective shares of the net income to Mrs. Wilson and Lady Whitmore direct instead of to the trustees of the will of J. G. Smith.

In 1893, at the date of the settlement now about to be stated, Mrs. Wilson had three children, of whom Miss Beatrice Wilson was one, and she had attained the age of twenty-one years. Lady Whitmore had never had any children.

By a settlement dated January 6, 1893, and made in contemplation of the marriage of Miss Beatrice Wilson and W. A. Blake Clarke, after recitals to the effect above stated, amongst other things, Miss Wilson granted, conveyed, and assigned to certain trustees, their heirs, executors, administrators, and assigns, "All and singular the one third part or share and all other the part share

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and interest of the said Beatrice Wilson under and by virtue of the will of J. G. Smith of and in one equal moiety of the freehold, copyhold, and leasehold hereditaments and other securities now held upon the trusts declared by the indenture of settlement of the 15th of June, 1861, subject nevertheless to the right of the said Mary Ann Wilson"—her mother—"to receive the income during her life"; and also "all that the one third part or share, or other the part or share and interest of the said Beatrice Wilson of and in the other moiety of the freehold, copyhold, and leasehold hereditaments and other securities last aforesaid in case the said Isabella Whitmore (Lady Whitmore) should die without having any child who should attain the age of twenty-one years, subject nevertheless to the right of the said Isabella Whitmore to receive the income during her life, and of the said Mary Ann Wilson after her death to receive the income thereof during the residue of the life of the said Mary Ann Wilson," to hold the same unto and to the use of the same trustees, their heirs, executors, administrators, and assigns (subject as aforesaid and subject as to the entirety to the said annuities), upon trust from and after the same should have fallen into possession to receive the same or to obtain conveyances and assignments thereof from the persons in whom the legal estate might then be vested, and to stand possessed of the said premises or the investments then representing the same, upon trust to invest such parts thereof as should consist of money in any securities upon which trustees might for the time being be by law authorized to invest trust moneys, and should stand possessed of the trust premises and such investments as aforesaid (thereinafter called the said trust premises), upon trust out of the rents, issues, dividends, income, and profits to pay outgoings, and to pay the residue of such rents, issues, dividends, income, and profits (thereinafter called the annual income) to Mrs. Blake Clarke during her life, and after her death to pay the annual income of a moiety to the said W. A. Blake Clarke during his life, or until he should charge or incumber the same or otherwise as therein mentioned; and, subject to the trusts aforesaid, should stand possessed of the whole of the trust premises in trust for all or such one or more, exclusively of the other or others, of the children or more remote issue of the marriage, such remoter issue to be born and to take vested interests within twenty-

one years of the death of Mrs. Blake Clarke, at such age or time, or such respective ages or times, for such estates and interests, and if more than one in such shares, and with such executory and other trusts for their respective benefit, and such provisions for their respective advancement, maintenance, and education at the discretion of the trustee or trustees of the settlement, or of any other person or persons, as W. A. Blake Clarke and Mrs. Blake Clarke should by any deed or deeds, revocable or irrevocable, jointly appoint; and in default of and subject to every such appointment then as Mrs. Blake Clarke, if she should survive her husband, should in like manner by will or codicil appoint, and in default of and subject to such appointment in trust for all or any of the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and their, his, or her heirs, executors, administrators, and assigns, and if more than one in equal shares, and if but one such child, then the whole in trust for such child and his or her heirs, executors, administrators, and assigns.

Mrs. Wilson died on October 23, 1912.

Lady Whitmore was still living, but had no issue.

In 1912, the annuitant, Mrs. Annie Smith, having died, the trustees of the settlement of 1861 conveyed the real estate to the trustees of J. G. Smith's will.

W. A. Blake Clarke predeceased his wife. There was issue of their marriage one child only, namely, Ileene Blake Clarke, now Mrs. Lawrence.

Mrs. Blake Clarke died on July 5, 1915, having by her will, dated May 8, 1899, in exercise of the power given to her by the settlement of 1893, appointed that "the trust funds and property comprised in the said settlement and the proceeds thereof" should be held "in trust to pay the income thereof" to Mrs. Lawrence for her life, if she should attain the age of twenty-one years or marry under that age, and after her death upon trust for such of her children as should be born during her (the testatrix's) life or within twenty-one years from the date of her (the testatrix's) death, and if there should be no such child, then upon trust for Mrs. Lawrence if she should attain the age of twenty-one years or marry under that age absolutely.

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In the interval between the settlement of 1893 and Mrs. Blake Clarke's death large portions of the freehold lands had been sold under the power in the settlement of 1861; part of the proceeds had been employed in paying off incumbrances and enfranchising the copyholds; other part was represented by investments in personalty at Mrs. Blake Clarke's death.

By a settlement dated October 29, 1915, made upon the marriage of Mrs. Lawrence (who had attained the age of twenty-one years), after reciting that questions had arisen and were intended to be submitted to the Court whether the appointment contained in Mrs. Blake Clarke's will was in respect of any part of the trust premises invalid, it was agreed that a settlement should be made of the part or parts (if any) of the trust premises to which Mrs. Lawrence was entitled by reason of the invalidation of the said appointment as therein more particularly mentioned.

This was an originating summons taken out by one of the trustees of the settlement of 1893 asking whether the appointment in the will of Mrs. Blake Clarke, in respect of any and what part of the trust property comprised in the settlement of 1893, was invalid so far as regarded the appointments to take effect after the death of Mrs. Lawrence.

It was admitted that the appointments were good with respect to the personal estate.

The defendants to the summons were Mrs. Lawrence and the trustees of her marriage settlement, one of whom was also a trustee of the settlement of 1893.

C. J. Mathew, K.C., and *P. F. S. Stokes*, for the plaintiff. The question in this case is what interest did Mrs. Blake Clarke settle by her settlement of 1893. That depends upon what interest she took under the will of her grandfather, J. G. Smith. It is submitted that under that will all that the trustees of it took was a right to call for a conveyance of the property from the trustee of the settlement of 1861. At the date, therefore, of the settlement of 1893 Mrs. Blake Clarke, who claimed through the will trustees, had not an equitable estate, but at most an equitable executory interest: *Abbiss* v. *Burney* (1); and consequently the rule now known as the rule in

(1) (1881) 17 Ch. D. 211.

Whitby v. *Mitchell* (1), which is concerned with legal and equitable remainders and not with executory interests, does not apply. The rule which was recognized in *Whitby* v. *Mitchell* (1) is one which forbids a limitation for the life of an unborn person with a limitation after his death to his unborn children to take as purchasers—see Jarman on Wills, 6th ed. p. 285—and was at the date of that decision confined to legal estates in land. In *In re Nash* (2) the rule was held to extend to equitable as well as legal estates in land, but the extension was very carefully limited. Throughout the judgment it was contemplated that there was an "estate" which was limited. In the present case there was no "estate" which could be limited, but merely an executory interest. As was said by Jessel M.R. in *Abbiss* v. *Burney* (3), "the direction to the trustees to convey is nothing like a remainder." That case was cited in *In re Nash* (2), and as no comment was made upon it, it must therefore be presumed that the Court accepted the decision as correct. The whole matter depends on these three cases. It is submitted that the decision in *In re Nash* (2) was not intended to sweep up a mere equity. All that Mrs. Blake Clarke settled was an equity in a mixed fund. The rule in *Whitby* v. *Mitchell* (1) ought not, it is submitted, to be further extended. [They also referred to Butler's note to Fearne on Contingent Remainders, 10th ed. vol. i., p. 565 n., and Challis on Real Property, 3rd ed. p. 77.]

Clauson, K.C., and *W. S. Eastwood*, for the defendants Mrs. Lawrence and the trustees of her marriage settlement. A distinction must be drawn between a mere equity (as where a person has an equity to have a document set aside or a married woman has an equity to a settlement) and an equitable estate, and also between a trust executory and a trust executed, which latter trust has the same construction as a legal limitation: see Norton on Deeds, p. 329.

To equitable estates the rule in *Whitby* v. *Mitchell* (1) applies: *Humberston* v. *Humberston* (4); *Monypenny* v. *Dering* (5); *In re Nash*. (2)

The fact that the legal estate was outstanding in the trustee of

(1) 44 Ch. D. 85.
(2) [1910] 1 Ch. 1.
(3) 17 Ch. D. 211, 230.
(4) (1716) 1 P. Wms. 332.
(5) (1852) 2 D. M. & G. 145.

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the settlement of 1861 does not make the trust an executory trust or prevent the application of the rule. The express duty of the trustee of that settlement was at the proper time to convey to the trustees of the settlor's will. This is no more than a trustee is bound to do in the absence of express direction, and the trust to convey operated to create an equitable estate in fee in the trustees to whom the conveyance was to be made and to create equitable estates in their cestuis que trust in accordance with the trusts. See the argument of Mr. R. Palmer and Mr. Peck in *Tatham* v. *Vernon* (1) referring to Lord St. Leonards' distinction between trusts executory and executed in *Egerton* v. *Earl Brownlow* (2); and see Lord Romilly's judgment in *Tatham* v. *Vernon* (3) relying on that distinction and concluding: "I am unable to see any distinction in this respect between an estate conveyed to trustees in fee, in trust to pay the rents to A. for life, and after her death in trust for all her children, as tenants in common, and a similar conveyance, in trust to pay the rents to A. for life, and after her death to convey and divide the estate unto and equally amongst her children as tenants in common."

Humberston v. *Humberston* (4) was a case of the application of the rule to an express "trust to convey." Mrs. Blake Clarke therefore at the date of the settlement of 1893 was entitled in equity to a vested estate in fee simple in remainder in a third part of one moiety, and to a contingent estate in fee simple in remainder in at least a third part of the other moiety. The fact that her estate was in remainder and not in possession does not affect the application of the rule. It is submitted that the rule applies to any settlement of a fee simple estate, whether in possession, remainder, or expectancy. Therefore, in order to see whether the settlement is obnoxious to the rule, the trusts of the will of Mrs. Blake Clarke must be read into the settlement of 1893, and the documents earlier than this settlement may for this purpose be disregarded. Reading this settlement and will together, it is manifest that the trusts of the will after the life estate to Mrs. Lawrence (who was unborn at the date of the settlement), being remainders to her children, must fail.

(1) 29 Beav. 604, 611.
(2) (1853) 4 H. L. C. 1, 210.
(3) 29 Beav. 614.
(4) 1 P. Wms. 332.

In *Abbiss* v. *Burney* (1) the rule in *Whitby* v. *Mitchell* (2) was not under consideration and was not referred to. The question was as to the application of the modern rule against perpetuities, which was then supposed not to apply to contingent remainders (see, however, now *In re Ashforth* (3)); and it was held that, where a testator had devised freehold and leasehold estates to trustees, and had directed them to retain to their own use the rents and income during the life of M., and after the death of M. to convey the estates to such son of M. as should first attain the age of twenty-five, this direction did not create an equitable remainder, because the trustees had during the life of M. the legal ownership and could not have a separate equitable estate, but that the direction was an executory devise, so that it was void for remoteness.

In fact, however, the rule now in question extends to all future estates, and is not confined to strict remainders: see Fearne on Contingent Remainders, 9th ed. p. 502; Williams on Real Property, 13th ed. p. 276; Norton on Deeds, p. 384; and the judgment of Cotton L.J. in *Whitby* v. *Mitchell.* (4)

Further, in considering the operation of the rule, regard must be had to the nature and quality of the property as it existed in 1893: *In re Bird* (5); *In re Dyson* (6); *In re Ibbitson's Estate* (7); *In re Thompson* (8); *Von Brockdorff* v. *Malcolm.* (9) The result of so regarding the property would invalidate the appointment so far as to affect the proceeds of sales of real estate made since 1893 by the trustees of the settlement of 1861 under the power of sale therein contained.

The present case is analogous to that of a gift of a fund of personalty to a charity where prior to the charity becoming entitled in possession the fund is invested by the trustees in real estate. In such a case the exercise by the trustees of their powers of investment has not been allowed to invalidate the gift and so alter the beneficial interests: *In re Hamilton* (10); *In re Prichard's Settlement.* (11)

For the purpose of the application of the rule in *Whitby* v.

(1) 17 Ch. D. 211.
(2) 44 Ch. D. 85.
(3) [1905] 1 Ch. 535.
(4) 44 Ch. D. 89, 90.
(5) [1892] 1 Ch. 279.
(6) [1910] 1 Ch. 750.
(7) (1869) L. R. 7 Eq. 262.
(8) [1906] 2 Ch. 199, 205.
(9) (1885) 30 Ch. D. 172, 181.
(10) [1896] 2 Ch. 617.
(11) (1903) 88 L. T. 197.

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Mitchell (1) there is no difference between freehold and copyhold estate: see Gray on Perpetuities, 3rd ed. § 318, p. 301, where the learned author points out that there may be contingent interests in copyholds and seems to think that they are within the rule; see also *Mogg* v. *Mogg.* (2)

C. J. Mathew, K.C., in reply. There are some interests in land to which the rule in *Whitby* v. *Mitchell* (1) does not apply, as for example executory trusts. The modern rule against perpetuities was introduced to catch something which did not fall within the rule in *Whitby* v. *Mitchell.* (1) *Tatham* v. *Vernon* (3) was a different case from the present. It did not deal with the nature but with the quantum of the interest. The analogy of the charity cases is not a fair one.

Cur. adv. vult.

Feb. 10. YOUNGER J. This summons raises, with regard to real estate of very considerable value, the question whether the appointment of it contained in the will of Mrs. Blake Clarke, who died on July 5 last, transgresses to any and, if so, to what extent the rule now known as the rule in *Whitby* v. *Mitchell* (1), which precludes the limitation of land to an unborn child for life with remainder to his or her unborn child. [His Lordship stated the facts substantially as above set out, and, referring to the appointment contained in Mrs. Blake Clarke's will, continued:]

Now it is not disputed that so far as that appointment dealt with or disposed of personal estate it is not obnoxious to the rule against perpetuities and is perfectly good; but being read, as for this purpose it must be read, into the settlement of 1893, then so far as the real estate is concerned it is in fact a limitation to a person then, that is in 1893, unborn for her life, with an attempt by way of remainder to limit an estate by purchase to that person's children; and it is said that this last limitation is bad as contravening the rule in *Whitby* v. *Mitchell.* (1)

Much has been said as to the meaning and propriety of that rule, and while some lawyers, and probably most publicists, do regret that the American view has not prevailed in this country and that a

(1) 44 Ch. D. 85. (2) (1815) 1 Mer. 654, 679, 687, 705.
(3) 29 Beav. 604.

rule so artificial (see for example Sargant J.'s recent decision in the case of *In re Bullock's Will Trusts* (1)), and now without defenders or necessity, has not been abrogated by the more modern rule against perpetuities, it is clear that in no Court other than the House of Lords can the existence of the rule be questioned, nor can its application to equitable as well as to legal estates in land be disputed: see *Whitby* v. *Mitchell* (2) and *In re Nash.* (3) And on that footing Mr. Mathew did not contest the point that the rule must be followed in this Court as occasion requires, nor did he contest the point that, on the construction of the settlement of 1893 standing alone, the rule did apply to this case. He agreed that if the interest thereby settled had either been a legal or an equitable estate in real property he was compelled by authorities binding on this Court to admit that the limitations to be read into the settlement by virtue of the appointment are obnoxious to the rule, and must fail as to the estate in remainder; but he said that no such estate was settled by the deed of 1893; he said that the direction in Mr. Graham Smith's will to the trustees of the settlement of 1861 to convey the settled hereditaments to the trustees of his will created merely an executory interest in the latter and no estate, and that it is only to an estate in land and to limitations carved out of it that the rule in *Whitby* v. *Mitchell* (2) has any application at all; and for this he relied on the judgment of the Court of Appeal in *Abbiss* v. *Burney.* (4) Now I do not agree with that contention in either of its branches. As to the first branch, that is to say, the precise interest of the will trustees, that of course only relates to the property comprised in the settlement of 1861, and not to the unsettled property disposed of by Mr. Graham Smith's will; and as to the settlement property, I think that in 1893, at the date of Mrs. Blake Clarke's settlement, the trustees of the will had an estate in equity in this property, and Mrs. Blake Clarke was entitled by way of vested remainder to one third of one moiety and contingently (subject to Mrs. Wilson's life interest) to at least one third of Lady Whitmore's moiety on the death of Lady Whitmore without having a child who attained twenty-one. I can see no ground for the view that in the eye of a Court of Equity Mrs. Blake Clarke's

(1) [1915] 1 Ch. 493.
(2) 44 Ch. D. 85.
(3) [1910] 1 Ch. 1.
(4) 17 Ch. D. 211.

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interest in the property was in any way affected by the mere accident whether the lands remained vested at law in the trustee of the settlement of 1861, or whether, the annuitant being dead, they were transferred to the trustees of the will; and the case of *Tatham* v. *Vernon* (1) bears out this view, where the Master of the Rolls says this: "I am unable to see any distinction in this repsect"—that is as to the nature of the interest—"between an estate conveyed to trustees in fee, in trust to pay the rents to A. for life, and after her death in trust for all her children, as tenants in common, and a similar conveyance, in trust to pay the rents to A. for life, and after her death to convey and divide the estate unto and equally amongst her children as tenants in common." But further, with regard to the second branch of Mr. Mathew's contention, I can find no warrant for the view that the rule in *Whitby* v. *Mitchell* (2) applies only to limitations carved by the settlor out of an estate of his own in fee simple, either at law or in equity, or that the quantum of the interest of the settlor, provided only that it is not merely a chattel interest in real estate, has any effect upon the rule. It may well be that the limitations themselves to be obnoxious to the rule must be of a particular kind, and it is for this, if for anything, that the observations in *Abbiss* v. *Burney* (3) are an authority in the present case; but the limitations in the settlement of 1893 are clearly within the rule. In my opinion, therefore, the rule applies to the freehold estate settled by the settlement of 1893, and the appointment of that estate is, to the extent I have stated, invalid. And that conclusion extends also, I think, to the copyhold estates. I can see no reason on principle why in this respect there should be any difference between freehold and copyhold property. There is no authority in favour of any such distinction, and I adopt the view of Mr. Gray that there is none: see Gray on Perpetuities, 3rd ed. § 318, p. 301.

But the question remains whether the invalidity extends to the real property as it existed at the date of the settlement, or only to the real property as it existed at the date when by her death the appointment contained in Mrs. Blake Clarke's will became operative. I am of opinion that it is to the latter property only that the

(1) 29 Beav. 604, 614. (2) 44 Ch. D. 85.
(3) 17 Ch. D. 211.

invalidity extends. The settled real estate and personal estate were, as often occurs, liable to be transposed and converted from time to time, and Mr. Clauson did not seriously contest that if the question depended only upon the true construction of the appointment made by Mrs. Blake Clarke's will it must be recognized that her intention was to appoint in the way she did the whole property, or, at least, so much as the law permitted her so to appoint. His argument was that, having regard to the terms of the power contained in the settlement, the appointment could only have full effect as regards the property which was at the date of the settlement personal estate. But it cannot, I think, be disputed that if the power of appointment in the settlement had been expressly framed so as to empower Mrs. Blake Clarke to appoint the settled property within the limits there stated to the full extent permitted by law, having regard to the nature and quality of the property at the time when the appointment became operative, that provision would have been perfectly good, and any appointment made in pursuance of it would have had effect accordingly ; and that, in my opinion, is the true effect of the power contained in the settlement. It is, of course, difficult to attribute to the parties to the settlement an intention with regard to a matter that probably never occurred to them, but it appears to me insensible to attribute to them any intention other than one to give to the appointor, to the fullest extent permitted by law, the powers conferred upon her. And to place any other construction on the power would produce a very remarkable result so far as the rule in *Whitby* v. *Mitchell* (1) is concerned ; for it would have the effect of making the actual appointment valid as to real estate if that real estate had been acquired by purchase since 1893, and invalid as to personal estate if that personal estate represented the proceeds of sale of real estate sold since 1893. I think that a loyal obedience to the rule in *Whitby* v. *Mitchell* (1) precludes me from arriving at such a result if I can avoid it, and I do so by holding that the intention both of the power in the settlement of 1893 and of Mrs. Blake Clarke when exercising it was that, to the fullest extent, having regard to the character and quality of the property at the date of her death, the destination directed by her should have effect. I find confirmation for this view in such cases as *In re*

(1) 44 Ch. D. 85.

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Thompson (1) and *Von Brockdorff* v. *Malcolm* (2); and having regard, amongst other considerations, to the very small fund of personalty existing in 1893, as contrasted with the value of the real estate at the same date, I am not in this case pressed by such considerations as are referred to and were given effect to in *In re Hamilton*. (3)

Solicitors for all parties: *Crawley, Arnold & Co.*

W. I. C.

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In re COOKE.

RANDALL *v.* COOKE.

[1915 C. 2638.]

Will — Construction — Advances — Hotchpot — Division of Income till Distribution—Advanced Legatee charged with Interest—Rate of Interest—Rules of the Supreme Court, 1883, *Order* LV., *r.* 64.

Testator, who died in 1913, bequeathed certain life annuities, and directed his trustees to carry on his business for not less than one year or more than two years from the date of his death, and gave directions for selling the same, including an offer to be made to two nephews, with provisions for payment of the purchase-money by instalments extending over seven years. He gave his residuary real and personal estate to trustees on trust for sale and investment, and directed them to hold the residuary trust funds in trust to pay the annuities, and subject thereto as to five sixteenth parts upon trust to invest the same and pay the income to his son S. during his life, with remainder to his children; and the testator declared that certain advances made to his son should not be treated as a debt owing to the testator, but should be brought into account by way of hotchpot in the division of the testator's residuary estate; and the testator directed the trustees to hold the remaining sixteenth shares upon trusts in favour of other persons and their children, and empowered his trustees to postpone sale and conversion, and directed the income of the unconverted property, including the profits from his business, to be applied from the date of his death in the same way as the income would have been applicable if such property

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(1) [1906] 2 Ch. 199. (2) 30 Ch. D. 172.
(3) [1896] 2 Ch. 617.

had been converted and the proceeds invested; and he especially directed his trustees to continue to hold as long as they should think fit his shares in certain companies, whether authorized or not under the investment clause contained in his will, without being responsible for any loss. The testator's estate consisted largely of shares in these companies, in which there was no free market and which were incapable of any accurate valuation. The average rate of interest earned by the estate since the testator's death exceeded 9 per cent.:—

Held, that the case was not one for an immediate valuation of the residuary estate and that pending the final division of the estate the advanced son ought to be charged with interest on the amount of his advance at the rate of 4 per cent. only.

In re Poyser [1908] 1 Ch. 828, *In re Craven* [1914] 1 Ch. 358, and *In re Forster-Brown* [1914] 2 Ch. 584 followed.

In re Hargreaves (1903) 88 L. T. 100 distinguished.

SAMUEL COOKE, who died on July 2, 1913, by his will dated February 20, 1913, bequeathed an annuity of 800*l.* a year to his wife during her life and a number of pecuniary legacies and two other life annuities, and thereby authorized and directed his trustees to carry on his business of oil and tallow merchant for not less than one year and not more than two years after his decease, and for that purpose to retain and employ therein the capital which should at his death be employed therein and such additional capital as they should think fit to advance from time to time out of his residuary estate; and directed and declared that at any time not later than one year nor more than two years after his decease his trustees should offer to sell the stock in trade, plant, and fixtures used in the said business (but not the book debts which his trustees should collect) to his two nephews therein named jointly if both were in his employ at the time of his decease and were living at the time of such offer, and if one of them were then dead should offer the said business for sale to the survivor of them provided he was in his employ at the date of his decease and living at the date of such offer; and if they or he, as the case might be, should decline such offer his trustees might at any time thereafter sell the said business to any person or persons and in such manner as they might think fit. And in case his nephews or nephew should so purchase as aforesaid the testator empowered his trustees to give credit for the payment of the purchase price by seven annual payments extending over seven years from the date of sale, with interest (to be payable half-yearly)

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at the rate of 5*l.* per cent. for the portion of the purchase-money for the time being unpaid, but with the option to his nephews or nephew to pay for the same at any earlier date. The testator continued: "I give devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust that my trustees shall (subject to the provisions hereinbefore given to them with regard to my said business) at their discretion sell, call in and convert into money the same, or such part thereof as shall not consist of money, and shall with and out of the moneys produced by such sale, calling in and conversion, and with and out of my ready money, pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto, and shall invest the residue of the said moneys, with power for my trustees from time to time to vary such investments. And I direct that my trustees shall stand possessed of the said residuary trust moneys and the investments for the time being representing the same (hereinafter called 'the residuary trust funds') in trust thereout to pay the said annuity to my said wife during her life and other annuities before mentioned; and subject thereto, I direct that my trustees shall stand possessed of the residuary trust funds upon the trusts following, that is to say, As to five equal sixteenth parts or shares thereof (but subject nevertheless to the provisions hereinafter contained) in trust to invest the same with power from time to time to vary such investments at discretion; and upon further trust that my trustees shall pay the income arising therefrom to my son Sam Cooke during his life," with remainder on trust for his children as therein mentioned, and continued: "Provided always and I hereby declare that the sums amounting to 5500*l.* which I have heretofore advanced by way of loan to my said son Sam and any other sum or sums which I may hereafter advance to him for his benefit either on account of the purchase of the stock and farm, implements and effects, at Thorpe Hall Farm, Hawden, in the county of York, or for any other purpose whatever, or so much thereof as may be owing to me at my decease, shall not be charged or claimed as a debt owing to me from him or his representatives, but every such sum, whether legally constituting a debt or not, shall be brought into account in the way of hotchpot in the division of the residuary trust funds as against my said son Sam, and his wife and

his children, or other the persons or person interested in his share of the residuary trust funds under the trusts hereinbefore declared." The testator disposed of the remaining shares of his residuary trust funds amongst other members of his family and their children, and empowered his trustees to postpone the sale and conversion of his real and personal estate or any part thereof for so long as they should think fit, and directed that the income of unconverted property (including the profits arising from the said business) should from the time of his death go in the same manner as the income of the proceeds thereof would have been applicable if the same had been converted; and empowered his trustees to lease his real or leasehold property remaining unsold and manage the same; and further expressly authorized and empowered his trustees to continue to hold for so long as they should think fit all or any part of his shares in the Bootle Tanning Company, Limited, the Northern Tanning Company, Limited, the Liverpool Tanning Company, Limited, and Randall & Porter, Limited (of Ulverston), and any stocks, shares, or other investments of any kind which might belong to him at the time of his death, and whether the same were of a nature authorized by his will or not, without being answerable or responsible for any loss arising thereby; and declared that his trustees might pay out of his estate any call or calls upon any shares which he might at the time of his death hold in any company (and particularly of the said tanning companies), and also might accept or refuse any new shares or stock in any such company or tanning companies which might be allotted or offered to them in respect of any shares or stock therein for the time being, and might pay out of his estate any call or calls to become due in respect of any new shares or stock which might be accepted by them.

The greater part of the testator's estate, which exceeded 50,000*l.* in value, consisted of shares in the companies named in his will and other private companies, which were retained by the trustees, and some new shares had also been allotted to the trustees since the testator's death. On the evidence the Court was of opinion that there was no free market in these shares and that they were incapable of accurate valuation.

This originating summons was taken out by the trustees for the determination of the following question: "Whether, on the true

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construction of the said will and in the events which have happened, the income of the testator's residuary estate ought to be divided in the following manner—that is to say, by adding for the purpose of computation to each year's actual income interest at the rate of 4 per cent. per annum (less income tax) upon the advance of 5500*l.* directed to be brought into hotchpot by the testator's son Sam Cooke, and then dividing the total sum so ascertained into the shares in which the beneficiaries are entitled under the said will, paying in the case of the share of the said Sam Cooke and his children his or their share of the said total sum less the said sum of interest, or in what other manner the said sum of 5500*l.* and interest thereon should be brought into hotchpot as directed by the said will."

Percy Wheeler for the summons.

Roope Reeve, for the persons interested in the shares of the advanced son. The right method of bringing the amount of the advance into hotchpot until the actual division of the estate is to charge the advanced son with 4*l.* per cent. on the amount of the advance, as in *In re Poyser* (1), *In re Craven* (2), and *In re Forster-Brown*. (3) The method of computation adopted by the Court of Appeal in *In re Hargreaves* (4), reversing Joyce J.'s decision (5), which was followed in *In re Gilbert* (6) and *In re Hart* (7), is against me in so far as the Court of Appeal there directed a valuation of the whole estate as at the testator's death, adding thereto the amount of the advance; but *In re Hargreaves* (4) has always been treated as an exceptional case, and proceeded on the footing that the testator intended a valuation of his whole estate to be made as at the date of his death. There is no such intention to be found in the present will, and the investments are of such a character that no satisfactory valuation can be made. The decision of Warrington J. in *In re Craven* (2) exactly covers the present case.

Owen Thompson, for other residuary legatees. The present case falls within the principle of *In re Hargreaves*. (4) The decision of the

(1) [1908] 1 Ch. 828.
(2) [1914] 1 Ch. 358.
(3) [1914] 2 Ch. 584.
(4) 88 L. T. 100; [1903] W. N. 24, 28.
(5) (1902) 86 L. T. 43.
(6) [1908] W. N. 63.
(7) (1912) 107 L. T. 757.

Court of Appeal in that case did not turn on the special fact that the estate was capable of valuation at the date of the testator's death, but on principle, namely, that hotchpot should be effected by bringing in capital and not notional income, and the advance ought to be treated as capital at the earliest period. The Court of Appeal in effect decided that an advanced son must bear his burden equally with the rest of the estate and that his advance must be treated as producing the same rate of interest as the rest of the estate. I rest my argument on *In re Hargreaves* (1) as establishing the principle of the equality of burden. That case has, no doubt, been stated to be a special case and easily distinguishable : see *In re Poyser* (2) and *In re Craven* (3) ; but there was nothing special in *In re Hargreaves* (1) except the direction to value advances in specie as at the date of the testator's death ; and there is in this case nothing abnormal in the will or the facts as there was in *In re Forster-Brown.* (4) Here, as in *In re Hargreaves* (1), the testator was thinking of a capital hotchpot. I suggest a modified direction based on *In re Hargreaves* (1), by which the son is treated as having in his hands part of the estate which bears interest at the average rate of interest produced by the rest of the estate. This will give effect to the principle of *In re Hargreaves* (1) without the necessity of a premature final valuation. There is nothing inherent in the provisions of the will or the state of the property to prevent a valuation at the death. In *In re Craven* (3) the property consisted of a large block of shares in a private company. Here the property included shares in various public and private companies, and on the evidence they are capable of a fair valuation. The present will contains an express power to the trustees to retain existing investments which made them authorized investments. The testator contemplated that his estate would continue to produce the same income as it was producing at the time of his death. The present case resembles *In re Hart.* (5) I ask the Court to apply the principle of *In re Hargreaves* (1) and, if there is a difficulty in determining rights at once, to keep matters in medio by charging the son with interest on his advance at the average rate produced by the estate as it stands.

(1) 88 L. T. 100; [1903] W. N. 24, 28.
(2) [1908] 1 Ch. 828.
(3) [1914] 1 Ch. 358.
(4) [1914] 2 Ch. 584.
(5) 107 L. T. 757.

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Bryan Farrer, for other residuary legatees. The true principle is that stated in *In re Hargreaves* (1), where Romer L.J. says (2): "It is true that the Court on occasions is obliged, in order to do justice between children and other parties, to put them in a state of equality, when no other method of doing it can be arrived at, to cause interest at some rate or other to be calculated, and treated as payable on account by some of the parties whose rights have to be adjusted; but the Court never does that unless it is bound to." There is no sound distinction in principle between the present case and *In re Hargreaves*. (1) The case of *In re Craven* (3) is no doubt similar in many respects to the present case, but there is a vital distinction for the present purpose, since in *In re Craven* (3) the securities were not authorized investments, and therefore there was no necessity for making any valuation at all, while in the present case, the investments being authorized, it will not be necessary to realize them by sale, and a valuation will at some time or other become necessary, and the inconvenience arising from a valuation is not avoided. The valuation should perhaps properly be made as at the expiration of one year from the testator's death.

Roope Reeve in reply. The suggested distinction between the present case and *In re Craven* (3) was not in any way the ground of the decision of Warrington J. in that case. The contention that the advanced son should be charged with the average rate of interest earned by the rest of the estate does not in any way meet the difficulty, since, if logically carried out, it would involve an annual valuation. The proper rate of interest is 4*l.* per cent.: *In re Davy* (4); Order LV., r. 64.

YOUNGER J. stated the terms of the testator's will, reading at length the hotchpot clause relating to the advanced son's share and the power to retain investments, and continued: Having regard to the terms of the will it is clear that the testator necessarily contemplated a postponement in the realization of his estate, taken as a whole, for some period which might be considerable. So far as his business was concerned, it might well be that there would be no offer to purchase by the nephews, in which case there is no power to

(1) 88 L. T. 100; [1903] W. N. 24, 28.
(2) 88 L. T. 101.
(3) [1914] 1 Ch. 358.
(4) [1908] 1 Ch. 61.

sell to any one else until the expiration of two years from the testator's death; and the payment of the purchase price for the business, if it were taken by the testator's nephews, might and probably would be extended over a period of seven years from the date of the sale. There are also annuities given to the testator's widow and to other persons, which would prevent the final appropriation of the shares of the residuary legatees free from the charge of these annuities. Moreover, at the moment of the testator's death there is no absolute interest given, but the residuary estate is divided into aliquot shares each of which is settled; and, although there is a curious introductory provision directing the shares of the son Sam to be invested, I do not find any special provision with regard to Sam's shares which is not equally applicable to the other shares in the residuary estate. The result, therefore, appears to me to be that, on the true construction of the will, until a final division of the whole residuary estate each of the persons interested is, in the contemplation of the testator, entitled to an aliquot share of the whole income of that estate and not to the whole income of an aliquot share.

The next thing to observe is that there appears to be no definite period fixed for the actual appropriation to the particular settled shares. There is nothing in the will to show that the testator contemplated that for any purpose a valuation would be essential, and clearly he did not intend that there should, for the purpose of division, be any valuation of the business, because there are definite provisions made for the sale of the business.

The next point to bear in mind is that the testator's estate at the time of his death consisted to a very large extent of shares in private companies for which there was not, even before the war, any free market in the ordinary sense of the term, although, by means of negotiation on the local stock exchanges, purchasers at a price could from time to time be found, and might even be readily found. But the nature of the market was not such as to render it possible to state by way of valuation the accurate value of these shares in the sense that that value could always be realized. On the evidence before me any valuation of these shares would necessarily be of an approximate and fluctuating character.

In that state of things, due regard being had to the terms of the

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testator's will and the character of his estate, some method must be adopted for the purpose of bringing into account by way of hotchpot this sum of 5500*l.* referred to in the will. Three rival methods have been suggested. The first is that which in point of fact was adopted by the Court of Appeal in *In re Hargreaves.* (1) That method, as I understand it, is this: You first value the whole residuary estate available for the residuary legatees as at the date of the death, or it might be—and I think Mr. Farrer was well advised in making this suggestion—as at the expiration of one year from the date of the death. To the valuation so reached you add for the purpose of computation the amount which has to be brought into hotchpot, that is, the amount of the advance itself. You then divide the total sum in money so arrived at into the shares into which by the will the residuary estate is divided and deduct from the share of the advanced son the amount of the advance. You thus ascertain in pounds sterling the actual value of each of the shares in the residuary estate, and you then further divide, as well for the purpose of dividend and interest as for the purpose of capital, the estate as it exists in the proportions so arrived at. That is the principle adopted in *In re Hargreaves.* (1) The second method, which is contended for by Mr. Owen Thompson as an alternative to that adopted in *In re Hargreaves* (1), if that method is not applicable here, is this: You value the estate exactly in the same way as according to the former method and thus arrive at a definite sum in pounds sterling representing the value of the estate; you then ascertain the income in pounds sterling which is realized by the estate so valued—the rate of interest which that estate is in point of fact producing—and then pending the final division of the estate charge against the advanced son that rate of interest upon the amount of his advance which is identical with the rate of interest from year to year produced by the estate upon the original valuation. The third method, for which Mr. Roope Reeve contends, is this: Until the time for final division and appropriation arrives no valuation at all is made. You do not consider capital at all, but only income, and you arrive at the income which has to be divided amongst the persons interested in the residuary estate by charging the advanced son with 4 per cent. interest upon the amount of his advance, by

(1) 88 L. T. 100.

adding that amount of interest to the total income of the estate, and then by dividing the total income of the estate in the proportions fixed by the will, deducting from the advanced son's proportion the amount of interest brought in by him.

The question is, which, having regard to the rule of the Court and the arguments addressed to me based on general ground, is the principle that ought to be adopted in the present case? In favour of the argument that *In re Hargreaves* (1) ought to be applied both Mr. Owen Thompson and Mr. Bryan Farrer strongly emphasized the statement in the judgment of Romer L.J. in that case to the effect that the Court never charges interest upon advances at any actual or approximate rate unless the Court cannot help itself. But if the observations of Romer L.J. on that point in *In re Hargreaves* (1) are carefully considered, it will, I think, be found that he goes no further than this, that the Court does not charge an advanced son with any interest, approximate or actual, in a case where it can accurately arrive at the valuation of the rest of the estate. I do not think that he has gone so far as to say—and I doubt whether, having regard to the facts in *In re Hargreaves* (1), he intended to say—that, in a case where there is any real difficulty in arriving at a proper valuation of the estate, it may not be better and fairer to charge interest rather than to rely upon valuation. That is the explanation of the observations of Romer L.J. pointed out by Warrington J. in *In re Craven* (2) and also indicated by him in *In re Poyser* (3), confirmed also, although in more general terms, by Sargant J. in the more recent case of *In re Forster-Brown.* (4) Those two judges moreover draw special attention to the fact that *In re Hargreaves* (1) was a very exceptional case, and that the principle adopted there—for which I understand no previous authority has been found—really turned upon the express and somewhat unusual provisions of the testator's will and pre-eminently upon a provision which, as interpreted by the Court of Appeal, indicated that the testator, having directed that the advances which had been made to his children in kind during his lifetime were to be definitely valued as at the date of his death, must thereby be taken also to have directed, although not in express terms, that the

(1) 88 L. T. 100.
(2) [1914] 1 Ch. 358.
(3) [1908] 1 Ch. 828.
(4) [1914] 2 Ch. 584.

YOUNGER J. 1916 — COOKE, *In re.* RANDALL *v.* COOKE. —

whole of his estate was also to be valued as at the same moment. The same learned judges further point out that *In re Hargreaves* (1) turned upon this special feature, namely, that, as found by Romer L.J. and Cozens-Hardy L.J., there was no difficulty whatever in valuing the testator's estate as at the date of his death having regard to the character and quality of that estate as it existed at that time.

Now in the present case before me there are no express provisions with regard to valuation, and there is undoubtedly a difficulty in valuing the estate on any accurate or permanent basis, and the question therefore is whether, notwithstanding *In re Hargreaves* (1) and having regard to all the circumstances, this is not one of those cases in which the Court will prefer to compute interest upon the amount of the advance to the advanced son rather than resort to a valuation of the whole estate which must necessarily be approximate and speculative only, but will nevertheless be final and irrevocable.

In my opinion it is fairer for everybody, and also in accordance with principle, that the method contended for by Mr. Roope Reeve should be adopted in the present case and that the advanced son should, pending the final division of the estate, be charged with interest upon his advance. And I lean to this view for the further reason that in my opinion the Court is entitled to have regard to the abnormal condition of things affecting valuations of property at the present time, and ought therefore to hesitate to have recourse where it can be avoided to a valuation which, although necessarily provisional and approximate, is to be used to produce a permanent result.

But Mr. Farrer has urged with great force that in the present case, having regard to the terms of the testator's will, it will be necessary at some time or other to have recourse to valuation in order to arrive at the actual proportions in which the parties interested in the residuary estate are to take that estate in specie. He points out that in the present case there is an express power conferred upon the trustees to retain all these investments to which I have referred and that it will never be necessary to sell them. Probably the trustees will desire to retain them both in the mass and also as

(1) 88 L. T. 100.

part of the appropriated shares of residue, and accordingly, if they do so determine, it will, he says, be essential that at some period or other these shares must be valued with all the inconvenience and all the difficulties to which I have alluded. He points out that in *In re Craven* (1), which he agrees, apart from this one point, would be indistinguishable from the present case, Warrington J. was able to arrive at a conclusion similar to that for which Mr. Roope Reeve contends, by reason of the fact that in that case it was not competent for the trustees to retain securities of the kind here in question, and that therefore, upon the principles laid down by Warrington J., there never would be the necessity for any valuation at all. One answer to that was given by Mr. Roope Reeve in his reply, namely, that Warrington J. did not decide *In re Craven* (1) on any such ground. The reason for his decision was based on the difficulty of making a valuation as at the date of the death, and as I read his judgment he had not present to his mind the circumstance that upon the principle adopted by him the necessity for making any valuation at all would never arise. There is also this further answer, namely, that, even if it be necessary to resort to valuation in the present case, it is eminently desirable that such valuation shall be made only when it becomes necessary for the purpose of division, and not at any earlier date, and that if only in order to avoid a premature and unsatisfactory valuation it is preferable to adopt the principle suggested by Mr. Roope Reeve and charge the advanced son with interest during the intervening period without regard to the actual value of the estate.

The rate of interest is the only remaining question. Is it to be a fluctuating rate of interest, as suggested by Mr. Owen Thompson, under the second method of hotchpot which I have indicated, or is it to be a fixed rate of 4 per cent. ? In my opinion the rate of interest must be 4 per cent. for this reason. The view now suggested by Mr. Owen Thompson was definitely rejected by Joyce J. in *In re Hargreaves* (2), where he decided as a matter of principle that, however attractive that view might be, there was no authority in support of it, and that accordingly a fixed rate of interest must be adopted. The Court of Appeal did not in terms differ from the decision of Joyce J. on this point, and I have heard no argument to

(1) [1914] 1 Ch. 358. (2) 86 L. T. 43.

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convince me that his judgment in this respect was not well founded, and moreover it is one which I consider to be binding on me. Further, the view suggested involves a valuation—an undesirable valuation—just as much as the first method, and, as Mr. Roope Reeve pointed out, if carried out at all logically, involves not one valuation but an annual valuation, which, of course, would be impracticable and highly inconvenient. What then is to be the rate? Although, having regard to the national necessities, the rate of interest has increased by reason of the war, nevertheless Order LV., r. 64, which fixes the rate of interest on legacies at 4 per cent., remains unaltered, and the Court of Appeal in *In re Davy* (1), relying on the analogy of that rule, held that interest at the rate of 4 per cent. and no other rate is properly chargeable on advances which have to be brought into hotchpot where interest is charged at all.

In my opinion, therefore, the principle which was applied in *In re Poyser* (2) is the principle applicable to the present case, and pending the final division of the estate the advanced son must be charged with interest on 5500*l.* at the rate of 4 per cent. per annum from the date of the testator's death.

Solicitors: *Kinch & Richardson, for Smith & Smith, Burnley; Corbin, Greener & Cook, for C. H. March, Selby; Littledale & Lefroy, for Southern, Fullalove & Ritchie, Burnley.*

(1) [1908] 1 Ch. 61. (2) [1908] 1 Ch. 828.

A. C.

YOUNGER J.
1916
March 14, 15, 21.

In re HUGHES.
LODDIGES *v.* JONES.

[1913 H. 1827.]

Will—Construction—Real Estate—"Statute for the distribution of the estates of intestate persons."

Testatrix devised and bequeathed her real and personal estate to trustees upon trusts in favour of her two children or their issue, and after the death of her last surviving child directed her trustees to sell and convert her real and personal estate and divide the proceeds among her grandchildren as therein mentioned, and in case both her children should die without leaving issue (which event happened) directed her trustees to stand possessed "of my real and personal estate and the proceeds of the same upon trust for those persons who would be entitled thereto under the statute for the distribution of the estates of intestate persons in like manner as if my said surviving child had been absolutely seised and possessed of the said real and personal estate and had died intestate." On a summons raising the question whether the heir-at-law or the statutory next of kin of the last surviving child or the heir-at-law of the testatrix became entitled to the real estate of the testatrix:—

Held, that upon the true construction of the will the real estate could not be treated as a converted fund; that the words "under the statute for the distribution of the estates of intestate persons" meant no more than if for these words there had been substituted the words "by law"; and that the heir-at-law of the last surviving child was therefore entitled to the real estate.

In re Hudson (1895) 72 L. T. 892 commented on.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment:—

By her will dated April 27, 1866, Maria Hughes gave, devised, and bequeathed all her estates and effects whatsoever and wheresoever, both real and personal, to the trustees therein named upon trust to permit the rents, interest, dividends, and annual proceeds to be received by her husband, Edward Hughes, during his life, and from and after his death she directed her trustees to stand possessed of her real and personal estate upon trust to receive, collect, and get in the rents, issues, profits, dividends, and annual proceeds thereof from time to time, and to divide the same equally between her two

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children, Ernest William Hughes and Alice Jane Hughes, share and share alike, for and during the term of their natural lives respectively, the share nevertheless of either of her children who might die during her lifetime or at any time after her decease leaving lawful issue to descend to such issue respectively and be divided amongst them in such shares and proportions respectively as her said deceased child should have by his or her last will directed or appointed, and in default of such appointment then share and share alike; and from and after the decease of her last surviving child the testatrix directed her trustees as soon as possible and convenient thereafter to sell and convert into money the whole of her said real and personal estate and effects and to divide the proceeds arising therefrom between and amongst her grandchildren rateably and in accordance with the shares to which they would respectively be entitled in the rents, issues, profits, dividends, and annual proceeds of the said real and personal estate as aforesaid before its conversion into money, it being her will that the power of appointment given by her to her children as above over the shares of their children should extend not only to the application of the annual income of such shares before the said conversion of her real and personal estate into money, but should also extend to the division of the principal moneys realized by such conversion when the same should become divisible, and that such power of appointment should also be exercisable by her last surviving child over his or her children's shares in like manner as the same might be exercised by her child previously deceased; and the testatrix also declared it to be her will that in case either of her children should die without leaving issue then and in such case she desired her trustees to stand possessed of her real and personal estate, and the rents, issues, profits, and annual proceeds thereof, upon the like trust in favour of her other child and his or her issue as she had already declared of and concerning the share of such other child and his or her issue by that her will; and the will then proceeds as follows, in a clause upon which the present question turns: "And in case both my children shall die without leaving issue I direct my trustees to stand possessed of my real and personal estate and the proceeds of the same upon trust for those persons who would be entitled thereto under the statute for the distribution of the estates of intestate persons in like manner as if my said surviving child had been

absolutely seised and possessed of the said real and personal estate and had died intestate."

The testatrix died in 1871. Her husband died in 1877. Her son Ernest William Hughes died in 1896 without issue, and her daughter Alice Jane Hughes died a spinster on June 18, 1913.

G. R. Northcote, for the summons.

Fairfax Luxmoore, for the heir-at-law of Alice Jane Hughes, the last surviving child of the testatrix. In the events which have happened the intention of the testatrix was that her real and personal estate should go to the persons to whom the law would give it if her last surviving child had died intestate and seised and possessed of the same respectively, and consequently the heir-at-law of the last surviving child takes such part of the estate as consists of real estate as a persona designata : *In re Hudson*. (1) The basis of the decision in *In re Hudson* (1) was that the heir-at-law of the testator took as a persona designata, and consequently that there was no intestacy as to real estate ; but I admit this was not argued on behalf of the testator's heir-at-law. The case is referred to in Theobald on Wills, 7th ed. p. 337, as an authority for the proposition that " A gift of real and personal estate to a person entitled under the statute as on an intestacy goes as regards the realty to the heir," and is also cited without adverse comment in Jarman on Wills, 6th ed. p. 1607.

There is no trust for out and out conversion applicable in the events which have happened. The trust for conversion was for the purposes of division. On the death of both children without issue the last surviving child is treated as being absolutely seised and possessed of the real estate as real estate, and if the earlier part of the will amounts to a conversion the clause in question amounts to a reconversion into real estate. The heir-at-law of the testatrix is effectually excluded by the actual gift to some one else, namely, the heir-at-law of the last surviving child.

Beddall, for the representatives of the heir-at-law of the testatrix. In *In re Hudson* (1) there was a clear gift of the whole of the real estate. The sole question was as to the beneficial interest, and it was held that there was a resulting trust for the heir-at-law. The effect

(1) 72 L. T. 892.

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of a gift referring to the Statutes of Distribution is considered in *Milne* v. *Gilbart* (1), *Garrick* v. *Lord Camden* (2), *In re Fitzgerald* (3), and Theobald on Wills, 7th ed. p. 335. I ask the Court to construe the will as it stands without alteration or addition, in which case the ultimate limitation referring to the statute is ineffective to dispose of real estate. The testatrix has no doubt made some blunder, but the only safe way in such a case is to adhere to the language literally. *Dunnage* v. *White* (4) and *Longley* v. *Longley* (5) show that an express gift to some other person is required in order to disinherit the heir-at-law of the testatrix.

Cyril Hartree, for next of kin of Alice Jane Hughes. The testatrix did not intend that her real and personal estate should go in different directions. There is an unequivocal direction to convert the real estate, to which effect must be given. In the clause in question the testatrix speaks of " my real and personal estate and the proceeds of the same " indifferently, showing that she was really dealing with a converted fund throughout.

Cur. adv. vult.

March 21. YOUNGER J. delivered the following written judgment:—The question which now falls to be determined is whether upon the true construction of the will of the testatrix, Maria Hughes, the real estate of which she was seised for her separate use at the time of her death passed on the death of her daughter, Alice Jane Hughes, to the heir-at-law of that daughter or to her statutory next of kin, or whether it has now devolved as undisposed of upon the heir-at-law of the testatrix.

The property in question consists of two freehold houses, Nos. 214 and 216, Mare Street, Hackney, and on the death without issue on June 18, 1913, of the daughter, Alice Jane Hughes, it being uncertain not only who, on the true construction of the will of the testatrix, was entitled to the property in question, but who in fact was the heir-at-law of Alice Jane Hughes or who were her statutory next of kin or who was the heir-at-law of the testatrix, this summons was taken out, and by an order of Warrington J. of July 28, 1914,

(1) (1852) 2 D. M. & G. 715; (1854) 5 D. M. & G. 510.
(2) (1807) 14 Ves. 372.
(3) (1889) 37 W. R. 552.
(4) (1820) 1 Jac. & W. 583.
(5) (1871) L. R. 13 Eq. 133.

inquiries were directed to ascertain who these different persons in fact were. These inquiries have been answered, the question at issue has been fully argued, and it now becomes my duty to decide who is the person entitled to these houses.

The will of the testatrix is dated as long ago as April 27, 1866. [His Lordship read the will and stated the facts as above set out, and continued :] The two houses in Mare Street, Hackney, have in fact remained unconverted, and they are now claimed, in the events which have happened, by the three separate claimants, or sets of claimants, to whom I have referred : first, by the heir-at-law of the testatrix on the ground that they have not been disposed of by her will properly construed ; secondly, by the heir-at-law of Alice Jane Hughes on the ground that he is entitled to them under the clause in the will of the testatrix which I have read ; and, thirdly, by the statutory next of kin of Alice Jane Hughes on the ground that the houses were at the date of the death of Alice Jane Hughes subject to a trust for conversion, and that accordingly her statutory next of kin are now entitled thereto under the provisions of the same clause as being personal estate to which that lady was under the will to be deemed to be entitled at the date of her death.

It will be convenient to deal first with the contention of the next of kin. The view of the will which Mr. Hartree on their behalf presented is very attractive, and I think it is quite possible that it may be in accordance with the real intention of the testatrix. The testatrix has nowhere else in her will directed that her real and personal estate shall go in different directions. She has on the death of the last survivor of her son and daughter, in terms which do not depend upon either of them having left issue, directed a conversion of her real and personal estate into money, and, in the clause in question, she deals with not only her real and personal estate but also with what she describes as the proceeds thereof. These are all strong indications that the testatrix had it in her mind to dispose of a converted fund, and I should have been only too ready so to hold if I had thought that the rest of the clause in question, fairly construed, enabled me to do so.

But it is, I think, impossible to arrive at that conclusion and at the same time give sufficient effect to the very emphatic words " as if my said surviving child had been absolutely seised and possessed

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of the said real and personal estate and had died intestate." In the face of these words I cannot, I think, properly arrive at the conclusion that the testatrix was dealing with a notionally converted fund of personalty. She in terms directs that that part of it which is realty shall go as realty, and accordingly I am constrained to hold, in accordance with Mr. Luxmoore's argument, either that the clause which I have read is a new disposition in which there is no direction to convert applicable to the event which has happened of both her children dying without leaving issue, or, if not, that the clause contemplates for the purpose of the devolution under it a reconversion to realty of the real estate, if pursuant to any power or trust contained in the will it shall have been in fact previously sold.

I think, therefore, that the statutory next of kin of Alice Jane Hughes cannot take. It now remains to consider whether this real estate passes to Mr. Luxmoore's client, the heir-at-law of Alice Jane Hughes, or to Mr. Beddall's client, the heir-at-law of the testatrix.

Mr. Luxmoore's contention that it passes under the will of the testatrix to his client is based entirely upon the decision of North J. in the case of *In re Hudson*. (1) In that case the will contained a clause in the following terms: "I give devise and bequeath all my property, real and personal, to my dear wife Amelia Florence Hudson, her heirs, executors, and administrators, upon trust for the person or persons who, under the statutes for the distribution of the effects of intestates, would have been entitled thereto in the event of my dying seised or possessed thereof intestate, such persons if more than one to take as tenants in common in the shares in which the same would have been divisible between them under the statutes." Upon that clause the question arose whether the widow and next of kin of the testator took both the real and personal estate as personae designatae or whether the real estate devolved upon his heir-at-law.

On behalf of the heir-at-law it was contended that the real estate devolved upon him because the clause in the will was inapplicable to real estate and that therefore the real estate resulted to him ab intestato.

North J., however, while holding the heir-at-law entitled, based his conclusion upon a different ground. He held that,

(1) 72 L. T. 892.

although the words were apt for dealing with personal estate and not with real estate, still it would appear that the testator did not understand them or thought or supposed that the statute referred to applied to real as well as personal estate, and he then proceeded as follows (1): "Putting the best meaning I can upon the language of the will, I do not think that he meant to divide the whole of his estate among his next of kin, but that it should go to the persons to whom the law would have given it had he died intestate. He thought that this was provided for by statute, and it is so far as the personalty is concerned; but there is no person who 'under the statutes for the distribution of the effects of intestates' can take the real estate. In my opinion, therefore, there is no intestacy, but there is a trust of the whole estate for the persons who would have been entitled thereto under the law of intestacy if the testator had died intestate; that is, as to the personalty for the next of kin, and as to the realty for the heir-at-law." That decision has found its way into the text-books without adverse comment, but I am bound to say that as reported the case is not to my mind completely satisfactory, nor is it one lightly to be followed.

There, of course, it made no difference to the heir-at-law in what character he took so long as he did take the real estate, and while the learned judge apparently rejected the ground upon which the heir-at-law based his claim, he had no one before him interested to object to the ground on which he based his decision. And that decision was certainly a very strong one, for, while it may be agreed that the testator had made some mistake with reference to the operation of the Statute of Distributions, it is by no means clear what his mistake was.

The learned judge seems to have been of opinion that his mistake was in supposing that the Statute of Distributions dealt not only with personal estate but also with real estate and that the statute directed the devolution of real estate in the manner provided by law. It appears, however, to be at least as likely, if not more likely, that the testator supposed not only that the Statute of Distributions, which he describes as a statute for the distribution of the *effects* of intestates, in fact dealt with the distribution of real estate, which he seems to have thought was included in the word

(1) 72 L. T. 895.

YOUNGER J. 1916 HUGHES, *In re.* LODDIGES *v.* JONES.

effects, but also that it dealt with real estate in the same way as it dealt with personal estate; and I think this view is the more likely because there is in the will a reference to the "shares" in which under the statute the persons are to take, a term which could have no reference to real estate if the testator had known or believed that it would devolve under the statutes upon his heir-at-law. If this view be correct it follows that the learned judge in deciding as he did was not correcting the testator's mistake; he was in fact confirming it.

In my opinion, therefore, the reason given for the decision in *In re Hudson* (1) is not as reported satisfactory, although the result was probably perfectly correct on the ground contended for there by the heir-at-law.

It is, however, only for its reasoning that the case is relied upon as an authority, and I should not myself have been prepared to follow it if I had thought that the words in the present will were in any sense the equivalent of those in *In re Hudson*. (1)

But in my opinion the provisions of the will now in question are materially different. First of all the testatrix here refers to the Statutes of Distributions as the *statute*, not the statutes, for the distribution of the *estates* of intestate persons.

Now this is not an accurate description of the statutes, and the character of the inaccuracy is significant. The Statutes of Distributions are properly described as the statutes for the distribution of the *personal* estates of intestates. There are two of them and not one, and they relate, and relate only, to personal estate. The testatrix in her will has described the thing she is referring to as the *statute* for the distribution of the *estates* of intestate persons, and it appears to me reasonably plain from her description that what she supposed was that the devolution of the real estate of persons who died intestate, like the devolution of their personal estate, was regulated by a statute instead of, as is the fact, being regulated by the common law. And this view is further confirmed by the fact that in the will of the testatrix there is no reference, as there was in the will before North J., to the shares in which the persons under the statute are to take, a provision which, as I have pointed out, is quite inapplicable to the devolution of real estate.

(1) 72 L. T. 892.

In other words, upon the true construction of this will, I think that the words " under the statute for the distribution of the estates of intestate persons " mean no more than if for these words there had been substituted the words " by law."

In my opinion, therefore, upon the words of this will it is permissible for me to give effect to what I must take to have been the principle of construction upon which North J. proceeded in *In re Hudson* (1), and none the less although I should not myself have been prepared to apply that principle to the will before him.

For these reasons I think that the real property here in question in the event which has happened has been validly devised by the will of the testatrix to the heir-at-law of Alice Jane Hughes.

If I still have a lingering doubt whether this decision gives full effect to the real intention of the testatrix and whether it does not give to her daughter's heir-at-law, who happens to be also one of that daughter's next of kin, a larger interest than she meant him to have, I am quite satisfied that it would not be on behalf of the testatrix's own heir-at-law that her disappointment would be manifested if she were now in a position to express her views.

Solicitors : *Snow, Fox & Higginson ; Daniell & Glover.*

(1) 72 L. T. 892.

A. C.

NEVILLE J.

1916

Feb. 16, 23; *March* 2.

In re SIMPSON.

COUTTS & CO. *v.* CHURCH MISSIONARY SOCIETY.

[1913 S. 577.]

Settlement—General Power of Appointment—Donee British Subject—French Domicil—French Will—General Bequest—Power exercised—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 1, 9, 10, 27—*Wills Act*, 1861 (24 *& 25 Vict. c.* 114), *s.* 1.

A British subject died domiciled in France leaving an unattested holograph will in French by which she gave the usufruct of "all the property and rights whatsoever" comprised in her estate to A. for life, with a gift over on A.'s death of "the ownership" of the said property and rights, and wholly cancelled "any testamentary or other disposition" theretofore made by her. The will was valid by French law and was admitted to probate in England:—

Held, that the will effectually exercised a general testamentary power of appointment which the testatrix had over the trust funds of an English settlement.

D'Huart v. *Harkness* (1865) 34 Beav. 324 approved and followed.

The dictum of Kay J. in *In re Kirwan's Trusts* (1883) 25 Ch. D. 373 followed by Kekewich J. in *Hummel* v. *Hummel* [1898] 1 Ch. 642, to the effect that the will of a British subject domiciled abroad, being a valid will by the law of the domicil and admitted to probate in England, must comply with the formalities required by ss. 9 and 10 of the Wills Act, 1837, in order to exercise a general testamentary power of appointment in an English settlement, dissented from.

ADJOURNED SUMMONS.

By a voluntary settlement dated December 15, 1908, and made between Pauline Simpson, of Tour de Belle Vue, Antibes, Alpes Maritimes, in the Republic of France, widow, of the one part, and Coutts & Co., of London, thereinafter called "the bank," of the other part, after reciting that Pauline Simpson had transferred into the name of the bank the stocks, shares, and securities described in the schedule thereto, it was witnessed that the bank should stand possessed of the said stocks, shares, and securities, and the investments from time to time representing the same (thereinafter called "the trust funds"), upon trust to pay the income thereof to Pauline Simpson during her life; and that, after her death, the bank should stand possessed of the trust funds

and the income thereof "upon trust for such person or persons as the said Pauline Simpson may from time to time by any deed or deeds revocable or irrevocable or by will appoint, and in default of appointment, or so far as any such appointment if incomplete shall not stand, in trust for" the Church Missionary Society.

On April 21, 1909, Pauline Simpson made and signed her holograph will in the French language, of which the notarial translation made for the Probate Division of the High Court was, so far as material, as follows:—

"I the undersigned declare by my present will that I bequeath to Mrs. Marthe Louise Julie Chapuiset the widow of my regretted brother Charles Ambroise Milsom doctor of medicine the usufruct during her lifetime as from my death of all the property and rights whatsoever comprised in my estate. . . . .

"I bequeath the ownership of all the property and rights (the usufruct whereof I have just bequeathed to Mrs. Marthe Chapuiset the widow of Mr. Milsom) to her children living at the time of my death. . . . .

"I appoint as testamentary executor with seisin Mr. Edward William Jules Chapuiset licentiate in law presently domiciled at No. 39 Route de Malagnon Geneve conferring upon him the most extended powers to wind up my estate. . . . .

"I hereby declare that I wholly cancel any testamentary or other disposition which may have been made by me heretofore."

In June, 1912, Pauline Simpson died at Tour de Belle Vue aforesaid. She was a British subject, and at the time of her death was and for many years prior thereto had been domiciled in France. Her will was valid by the law of France and was proved in London by Edward William Jules Chapuiset, the sole executor thereof. The bank had never received any notice of any appointment being made by the testatrix under her said power of appointment, and took out this summons to determine whether or not her will exercised the power.

The affidavit evidence of French experts was to the effect that the will of the testatrix was amply sufficient in French law to pass all property which she could in any way dispose of at her death, also that French law does not understand the difference between power and property as understood by English law, and that if a French Court

NEVILLE J. 1916 SIMPSON, *In re.* COUTTS & Co. *v.* CHURCH MISSIONARY SOCIETY.

was asked whether the will of the testatrix exercised the power of appointment conferred by the settlement, it would, after having had the nature of the power in the settlement explained to it and the points wherein a power in English law differs from property, simply consider whether the will showed on its face any intention to exercise the power. The experts also gave their opinion on the construction of the will. The testatrix had no property in England other than that comprised in the settlement, except a small annuity that determined at her death.

J. M. Paterson, for the plaintiffs.

Jenkins, *K.C.*, and *Spencer*, for the Church Missionary Society. The rules to be observed in construing a foreign document are stated in *Di Sora* v. *Phillipps* (1), *Stearine Kaarsen Fabrick Gonda Co.* v. *Heintzmann* (2), and we submit that the evidence of the French experts on the construction of the will and as to how a French Court would construe it is not admissible.

[NEVILLE J. On a question of construction the French Courts cannot advise this Court, but where the question is what are the rules of construction which guide the French Courts in construing a document, that evidence is admissible.]

Assuming that to be so, we say the French law does not apply, and that the will, although admitted to probate by Lord Kingsdown's Act (24 & 25 Vict. c. 114), cannot operate at all as an exercise of the power because it is not attested by two witnesses as required by ss. 9 and 10 of the Wills Act, 1837—*In re Kirwan's Trusts* (3)—and that the rule of s. 27 of the Act is not imported into it. *In re Price* (4) will be cited against us, but the distinction between that case and this is that there the testatrix was not a British subject, and that was one of the grounds on which Stirling J. in that case distinguishes it from *In re Kirwan's Trusts.* (3) It is true that the main ground of the decision in *In re Kirwan's Trusts* (3) was that the will was a fraud on the power, but Kay J. states that the will of a British subject domiciled abroad must comply with the formalities of ss. 9 and 10 of the Wills Act in order to operate as the exercise of a testamentary power of appointment, and Kekewich J.

(1) (1863) 10 H. L. C. 624, 633.
(2) (1864) 17 C. B. (N.S.) 56, 60.
(3) 25 Ch. D. 373, 378.
(4) [1900] 1 Ch. 442, 448.

in *Hummel* v. *Hummel* (1) followed that ruling. *In re D'Este's Settlement Trusts* (2) and *In re Scholefield* (3) are in our favour. In the next place, admitting that the testatrix could have exercised the power by her will, the question is whether in fact she did. For this purpose in construing the will one must consider, having regard to *In re Kirwan's Trusts* (4) and that s. 27 does not apply, the old law before the Wills Act, 1837, as to testamentary powers of appointment: Farwell on Powers, 2nd ed. p. 176. Here the will neither refers to the property nor the power, nor does it on its face indicate any intention to exercise the power.

F. E. Farrer, for the defendants, the beneficiaries under the will and the executor. The will being valid according to the law of the domicil is capable of exercising the power by virtue of the comity of nations, and whether English law or French law applies, whether s. 27 of the Wills Act, 1837, does or does not apply, the will on its construction indicates an intention to exercise the power. According to the evidence of the French experts the word "property" is wide enough to pass all the property of which the testatrix was capable of disposing. Some meaning therefore should be given to the words "rights whatsoever." A charge by a company on its property present and future will not include uncalled capital, because the right to make a call is rather a power than property: *Bank of South Australia* v. *Abrahams* (5); but a charge by a company on its "property and rights" will include uncalled capital: *Howard* v. *Patent Ivory Manufacturing Co.* (6) The testatrix had the right to exercise the power of appointment. I also rely on the word "cancel." The only previous disposition of property that the testatrix had made was the voluntary settlement, and the only way in which she could in any sense cancel it was by exercising the power and thereby divesting the interest of the charity and making the trust funds her property for the purposes of her will. In the next place the will is also capable of exercising the power under Lord Kingsdown's Act and imports the rule of s. 27. The definition of a "will" in s. 1 of the Wills Act, 1837, extends to "an appointment by will or by writing in the nature of a will in exercise

(1) [1898] 1 Ch. 642.
(2) [1903] 1 Ch. 898.
(3) [1905] 2 Ch. 408.
(4) 25 Ch. D. 373, 378.
(5) (1875) L. R. 6 P. C. 265, 271.
(6) (1888) 38 Ch. D. 156, 169.

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of a power . . . . and to any other testamentary disposition," thus showing clearly that the Legislature considered such a writing a testamentary disposition. Sect. 9 applies to wills exercising powers as well as to true wills, and the object of s. 10 is to make a will exercising a power and executed with two witnesses a good execution of the power notwithstanding further requirements of the power. The authorities at the date of Lord Kingsdown's Act show the intention of that Act. It had been decided that a will of personal estate of a British subject domiciled abroad, though made with English formalities, was invalid unless the law of the domicil admitted these formalities: *Stanley* v. *Bernes* (1); *Bremer* v. *Freeman.* (2) It had also been decided that a will in English form not allowed by the law of the domicil was capable of exercising an English power: *In the Goods of Alexander* (3), dissenting from a dictum to the contrary in *Crookenden* v. *Fuller* (4); and this decision was subsequently considered in *Murphy* v. *Deichler* (5) to be too well established to be departed from. Lord Kingsdown's Act, passed in 1861, is headed an Act "to amend the law with respect to wills of personal estate made by British subjects." In other words, it amends the Wills Act, 1837, and enacts, s. 1, "Every will and other testamentary instrument," etc., thus clearly applying to wills made by British subjects in exercise of powers as well as true wills, and substituting for the formalities of ss. 9 and 10 of the Wills Act, 1837, where Lord Kingsdown's Act applies, the formalities required by Lord Kingsdown's Act and importing s. 27. Then in 1865 *D'Huart* v. *Harkness* (6) decided that a French subject domiciled in France could exercise an English power either by holograph will according to the domicil or by will according to English formality. This decision was approved and followed by Stirling J. in *In re Price* (7), who distinguished *In re Kirwan's Trusts.* (8) *D'Huart* v. *Harkness* (6) was not cited in *In re Kirwan's Trusts* (8), and the dictum of Kay J. that Lord Kingsdown's Act does not apply to a will made in exercise of a power unless it complies with the formalities of ss. 9 and 10 of the Wills Act, 1837, cannot, it is submitted, be sustained. *In re*

(1) (1830) 3 Hagg. Ecc. 373.
(2) (1857) 10 Moo. P. C. 306.
(3) (1860) 29 L. J. (P. & M.) 93.
(4) (1859) 1 Sw. & Tr. 441, 454.
(5) [1909] A. C. 446.
(6) 34 Beav. 324.
(7) [1900] 1 Ch. 442.
(8) 25 Ch. D. 373.

D'Este's Settlement Trusts (1) and *In re Scholefield* (2) deal with the will of a foreigner and do not apply to the will of a British subject. An appeal in *In re Scholefield* was settled. (3)

Jenkins, K.C., in reply.

Cur. adv. vult.

March 2. NEVILLE J. The first question in this case is whether the testatrix, a British subject domiciled in France, has indicated an intention to execute the general power of appointment reserved to her under a voluntary settlement made in England. If s. 27 of the Wills Act, 1837, applies, there is no doubt that the power was executed. But in my opinion, even if s. 27 does not apply there is enough in this will to indicate an intention to execute the power and to call in aid the English law. The testatrix speaks of "all the property and rights whatsoever" comprised in her estate and bequeaths the ownership of all the property and rights previously referred to, and further says, "I hereby declare that I wholly cancel any testamentary or other disposition which may have been made by me heretofore." She had no "right," so far as the evidence shows, except the right to appoint under the settlement.

It would seem from the authorities that a very slight indication of intention will suffice. In *In re Price* (4) it was held by Stirling J. that the words "I declare that this will annuls all the others and that it shall *thus* be considered in England as well as in France" showed an intention that English law should prevail in the construction of the will, including the rule of construction contained in s. 27. I think the learned judge decided that, if the English rules of construction were to apply, s. 27 must apply notwithstanding that the will was not attested by two witnesses. It will appear later that in my judgment in regard to a power English rules of construction must always apply, at all events where powers are unknown to the law of the domicil. I think here there is a good deal more to go upon than in *In re Price.* (4) In the first place, words are used in the gift which would be unnecessary to pass property, which is all that could be passed by French law; and, secondly, the testatrix cancels all previous testamentary or other dispositions, the only previous

(1) [1903] 1 Ch. 898.
(2) [1905] 2 Ch. 408.
(3) [1907] 1 Ch. 664.
(4) [1900] 1 Ch. 442.

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disposition disclosed by the evidence being the voluntary settlement containing the power. This in itself appears to me at least as strong an indication that s. 27 was intended to apply as the use of the words quoted above in *In re Price.* (1) The testatrix indicated, I think, an intention to cancel the dispositions contained in the voluntary settlement, and the only way in which this could be done was by the execution of the power. Moreover, in the present case I think that s. 27 would apply and the power would have been duly executed had the will contained nothing more than a general bequest. The will is a valid will in England, but the testatrix being domiciled in France the construction would be prima facie in accordance with French law. The evidence shows that the words used would be sufficient according to French law to pass all her personal property. A power of disposition by will over property not belonging to the testator is, however, unknown to French law, and in ascertaining whether the will disposed of such property a French Court would be compelled to inquire what such a power was and how it could be executed by an English will. The answer would be that the bequest if contained in an English will would be sufficient to pass the property subject to the power. And so in an English Court the construction which would be applied to an English will must be applied to the construction of a French will valid in England so far as regards the power. Lord Wrenbury, then Buckley J., in *In re D'Este* (2) held that s. 27 of the Wills Act did not apply to a French will, holding, I think, that if ss. 9 and 10 applied the will was not entitled to probate, while if they did not apply neither could s. 27 apply. I am unable to see why. Sects. 9 and 10 deal with the formalities required by English law with respect to wills of persons domiciled in England, both generally and with regard to the testamentary execution of a power of appointment. In both cases they have to be attested by two witnesses to be valid, but wills attested by two witnesses are not the only wills valid according to English law. Wills executed abroad conforming to the requirements of the law of the testator's domicil have both before and since the Wills Act, 1837, been recognized by the English law, while under the Act of 1861 (Lord Kingsdown's Act) the validity of wills of British subjects executed abroad has received further extension. I think I am right in saying that Buckley J.'s

(1) [1900] 1 Ch. 442. (2) [1903] 1 Ch. 898.

decision depended mainly on the view that French rules of construction must be applied in determining the meaning of a French will, and, if so, s. 27 could not apply because French law knows nothing of s. 27. But neither does it know anything of powers of appointment by will, so that a resort to English law was essential, involving, as it appears to me, the consideration of what was necessary for the execution of the power by will. In *D'Huart* v. *Harkness* (1) the Master of the Rolls says in his judgment, with every word of which I concur, "A power to appoint by will, simply, may be executed by any will, which, according to the law of this country is valid, though it does not follow the forms of the statute." In this case the will was that of a foreigner and the property over which the power was given was referred to. In *In re Kirwan's Trusts* (2) Kay J. held in the case of a British subject that no appointment by will could be valid unless attested by two witnesses : see p. 381. This appears to be directly contrary to the decision in *D'Huart* v. *Harkness* (1), and moreover such a decision was unnecessary inasmuch as the instrument creating the power required attestation by two witnesses and the attempted execution was held to be a fraud upon the power. In that case the learned judge says that Lord Kingsdown's Act does not refer to a power of appointment at all, with which I cannot agree. In my opinion the execution of a power by will is a testamentary disposition. It certainly is so defined in the Wills Act, 1837. In *Hummel* v. *Hummel* (3) Kekewich J. followed *In re Kirwan's Trusts* (2), referring to ss. 9 and 10 of the Wills Act, 1838. In *In re Price* (4) Stirling J. in the case of a foreigner approved of the decision in *D'Huart* v. *Harkness* (1) and distinguished *In re Kirwan's Trusts* (2) and *Hummel* v. *Hummel* (3) on the ground that they dealt with wills only valid under Lord Kingsdown's Act. This distinction does not seem to me very satisfactory. Both before and since Lord Kingsdown's Act a will executed abroad in accordance with the law of domicil was entitled to probate in England and capable of executing a power of appointment by will. The distinction has the curious result of depriving a British subject of a right he previously possessed under the supposed operation of Lord Kingsdown's Act, which by s. 4 expressly

(1) 34 Beav. 324, 328.
(2) 25 Ch. D. 373.
(3) [1898] 1 Ch. 642.
(4) [1900] 1 Ch. 442.

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preserves the validity of testamentary instruments which would have been valid if that Act had not been passed. He held, further, that the testatrix had indicated an intention that English law should prevail and applied s. 27 of the Wills Act. *In re D'Este* (1), with which I have already dealt, followed, and the will was that of a foreigner. In *In re Scholefield* (2), the case of a foreigner, Kekewich J. followed *In re D'Este* (1), but apparently on some different and, I think, contradictory ground, for he says: "It seems to me that the question for decision is one of English law, and I take it that, whatever else it might decide, the French Court would necessarily follow English authorities on a question of English law." It appears to me that, having regard to the position in which I find the authorities, I am entitled to decide this point in accordance with my own judgment. In my opinion, in considering the question of the execution of a power of appointment by will made abroad but admitted to probate in England, the Court will have regard to the rule of construction contained in s. 27 of the Wills Act, 1837, both in regard to the wills of British subjects and of foreigners, and a gift which according to the law of the domicil amounts to a general bequest of personal estate operates as an execution of a general power of appointment by will unless a contrary intention appears by the will. For both reasons, therefore, I hold the power to have been duly exercised by the will of the testatrix. Before parting with the case I venture to protest against expressions which have crept into the reports of these cases of a "domiciled Englishman" and a "domiciled foreigner." All Englishmen and all foreigners are alike domiciled, and the addition of the word "domiciled" in this connection is meaningless—the question is, where were they domiciled? They are Englishmen or foreigners not by domicil but by allegiance.

Solicitors: *Farrer & Co.; Bridges, Sawtell & Co.*

(1) [1903] 1 Ch. 898. (2) [1905] 2 Ch. 408, 417.

H. L. F.

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1916
March 3.

In re SANDYS.
UNION OF LONDON AND SMITHS BANK *v.* LITCHFIELD.

[1915 S. 2196.]

Settlement—Portions—Trustees of Term—Power to postpone raising —"Reasonable Means"—Duty to have regard to Interests of Estate generally.

Trustees of a term for raising portions by sale or mortgage or by "any other reasonable means," with power in their discretion to postpone the raising of the same, are bound to take into account the interests of the persons entitled to the estate as well as the interests of the portioners.

Testator, in exercise of a power contained in a settlement to appoint portions to the amount of 25,000*l.*, appointed the estate to trustees for a term of 1000 years on trust upon the death of a tenant for life, who died in 1915, to raise the portions by mortgage or sale of the hereditaments, or by receipt of the income thereof, or by sale of timber or minerals, or by any other reasonable means, with power in their discretion to postpone the raising of the same. The trustees of the term found that the only practicable way of raising the portions immediately was by mortgage at the rate of 6*l.* per cent. The total value of the estate and capital moneys was estimated at some 174,000*l.* The present tenant for life objected to the immediate raising of the portions and offered to increase the rate of interest on the portions from 4*l.* to 5*l.* per cent. as a condition of postponing the raising of the portions. On a summons for directions taken out by the trustees of the term :—

Held, that the trustees of the term ought to have regard to the interests of the persons entitled to the estate as well as to the interests of the portioners, and under the circumstances the Court gave liberty to the trustees to postpone the raising of the portions for the period of one year if and so long as the tenant for life paid the increased rate of interest, with liberty to apply at the end of the year.

Adjourned Summons.

By an indenture of settlement dated November 7, 1902, certain hereditaments situate in the county of Surrey and the city of Westminster were limited to the use of Hannibal Speer during his life, with remainder to the use of Edward Frederick Sandys during his life, with remainder to the use of his eldest daughter Marianne Frances Cecilia Litchfield during her life, with remainder to the use of

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her first and other sons successively in tail male, with remainder to the use of her daughters as tenants in common in tail male, with remainder to the use of each of the four younger daughters of the said Edward Frederick Sandys successively during her life, with remainder to the use of her sons and daughters in tail, with an ultimate remainder to the use of the said Marianne Frances Cecilia Litchfield in fee simple; and power was thereby given to the said Edward Frederick Sandys by deed or will to charge the said hereditaments with the payment of any sums of money not exceeding 25,000*l.* with interest thereon from the death of the survivor of himself and the said Hannibal Speer at a rate not exceeding 4*l.* per cent. for the portion or portions of his said four younger daughters or their issue, with such provisions for maintenance, advancement, and otherwise as the said Edward Frederick Sandys should direct, and to appoint the said hereditaments so charged for any term of years "upon usual trusts by mortgage or otherwise to raise the principal and interest charged and all costs of raising the same"; and by the same indenture certain investments were settled in like manner as the freehold hereditaments thereinbefore settled.

Edward Frederick Sandys had four younger daughters, and by his will dated June 18, 1907, in exercise of the power conferred on him by the indenture of settlement, charged all the hereditaments, capital moneys, and investments with the principal sum and interest thereinafter directed to be raised under the trusts of the term thereinafter mentioned; and in further exercise of the power appointed that all the said hereditaments should be to the use of the Union of London and Smiths Bank, Limited, for the term of 1000 years, upon trust that they should "by mortgage or sale or demise of the premises, or any part thereof, for all or any part of the said term, or by receipt of the income thereof, or by sale of timber or minerals, or by all or any of those means, or by any other reasonable means, raise for the portions of" his said four younger daughters and their children the sum of 25,000*l.* and interest thereon until the raising or payment thereof at the rate of 4*l.* per cent. per annum, computed from the death of the survivor of himself and the said Hannibal Speer, and any costs incurred in or about raising the same: "Provided always that my trustees may in

their discretion postpone the raising of the said sum of 25,000*l.*, or any part thereof, for such period as they may think fit, and that the interest at the rate of 4*l.* per cent. per annum payable in respect thereof, or any part thereof, under the trusts of the said indenture of settlement and this my will shall be paid and applied during such period of postponement in like manner as the income of the said sum of 25,000*l.* when raised is hereby directed to be paid and applied"; and the testator thereby settled one equal fourth share of the said sum of 25,000*l.* on each of his four younger daughters for her life, with remainder to her children.

Edward Frederick Sandys died on November 15, 1910. Hannibal Speer died on April 3, 1915.

The estimated value of the hereditaments was some 150,000*l.* and of the investments some 24,000*l.*

On the death of Hannibal Speer the Union of London and Smiths Bank, Limited, the trustees of the term, proceeded to see how they could best raise this sum of 25,000*l.*, and they found that it would be impossible to raise it by the sale of the investments subject to the settlement, because, although there were minimum prices quoted as to a large part of the investments, those prices in fact could not be realized and only a comparatively small portion of the sum could be realized by sale of any of those investments, and that part only at a heavy sacrifice. As regards a sale of any part of the hereditaments subject to the settlement, they found that there would be great difficulty in effecting any sales under present conditions; and, as regards a mortgage, they found that the only lenders were insurance companies, who not only required at least 5 per cent. interest, but also made it a condition that insurances on the life of the tenant for life should be taken out, which would entail a heavy expense on the tenant for life, and in the present case was inappropriate in view of the fact that the settled property was permanent property and not a life interest merely. Lately, however, they found that an insurance company was willing to lend the amount without the obligation of taking out an insurance on the life of the tenant for life, but only at the rate of 6 per cent. per annum, the loan not to be either called in or paid off for a period of five years; and under these circumstances they took out this originating summons for the direction of the Court whether they ought

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to take any and what proceedings to raise the said sum of 25,000*l.* and interest by mortgage of the said term of 1000 years.

St. John Clerke, for the summons.

Martelli, K.C., and *W. Gordon Brown*, for the portioners. The exercise of the power by the tenant for life was for the benefit of the portioners alone and the term was created for their benefit alone. The trustees of the term, in the exercise of their discretion, ought therefore to have regard to the interests of the portioners alone. It is obviously to their interest to have the sum raised at once while they will get the benefit of the high rate of interest now prevailing. The hardship, if any, of realizing the portions under existing conditions is one that ought to be borne by the estate. The means of the tenant for life are out of all proportion to those of her younger sisters.

Romer, K.C., and *J. B. Dyne*, for the tenant for life. The trustees of the term are bound to take into consideration the interests of the tenant for life and remaindermen under the settlement as well as the immediate interests of the portioners. This is clearly so on the language of the will, where the words "or by any other reasonable means" must have reference to what is reasonable from the point of view of the estate generally. To raise the money by mortgage at the rate of 6*l.* per cent. would be a hardship on the tenant for life and the estate. The tenant for life has already offered to increase the rate of interest on the portions from 4*l.* to 4½*l.* per cent., and she is now willing to increase that offer to 5*l.* per cent. [They referred to *Berry* v. *Wyndham*. (1)] (2)

SARGANT J. This is a summons by which the trustees of a term of 1000 years ask the direction of the Court whether they ought to take any proceedings to raise a sum of 25,000*l.* with interest by mortgage of that term. The trustees have expressly submitted the exercise of any discretion they may have to the Court; they are

(1) (1857) 23 Beav. 521.

(2) They also argued that to raise the portions by mortgage was the realization of a security within s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, but as his Lordship declined to express any opinion on the point, this part of the argument is omitted.

themselves asking the Court what would be a proper exercise of their discretion.

The question seems to me to be one of great importance quite apart from the fact that a large sum of money is involved. Shortly stated the facts are as follows: [His Lordship stated the facts and read the material parts of the settlement and will and said that the only practicable way of raising the money at once appeared to be by way of mortgage to the insurance company, and continued:] The question therefore comes to this, whether, under those circumstances, the trustees ought or ought not to effect that mortgage. It is a question of effecting that mortgage and not of adopting any of the other means which I have mentioned. The first and ruling consideration with regard to this question is whether, as contended by Mr. Martelli, the trustees owe a duty only to the portioners and are bound to consider their interests alone without any regard to the effect which the raising of the money may have on the persons entitled to the estate, or whether they may also and ought to consider the interests of the persons entitled to the estate.

In my opinion the latter is the true view. It is noticeable that the trustees are only to raise the money by the means stated "or by any other reasonable means." It can be of no importance for the portioners as such whether the means are reasonable or not provided they get their money. The phrase "reasonable means" obviously has reference to this, that the trustees are not to exercise their trust so as unduly to hamper or sacrifice the estate. Further, the power of postponement in the discretion of the trustees seems to me obviously one which is inserted in order that the trustees may be at liberty to avoid unduly injuring the persons interested in the estate. It is difficult to suggest any other adequate reason for its insertion.

Generally speaking, any person at all familiar with the way in which real property is settled in this country must recognize that makers of settlements, while desirous that a certain provision shall be made for the younger children, also exercise the greatest care that the general interests of the property as a family estate shall be preserved for the benefit of the head of the family and those who succeed him. In my opinion one of the considerations which may

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actuate and ought to actuate the trustees under the trusts of this settlement and will is the desire not to unduly injure the owners of the estate in the course of raising the provision which the makers of this settlement have thought fit to make for the younger branches of the family.

Some stress was laid by Mr. Martelli upon the contrast between the large means of the eldest daughter and the comparatively narrow means of the younger daughters under this settlement. In my opinion that is not a circumstance which the Court can properly take into account. The proportion between the benefits given to the eldest and the younger daughters is fixed by those who were the owners of the property and who were entitled to settle what that proportion should be.

The tenant for life has offered to the trustees as a condition of their discretion being exercised in the direction of postponing the matter for a certain time that she would pay interest at the rate of 4½ per cent. That was the original proposal, and under the pressure of the case as it proceeded, and in deference to a suggestion made by me, she is now willing to increase that rate to 5 per cent. In my judgment that is an offer which the trustees in their discretion ought to accept. It appears to me that at the present time one has to consider really two rates of interest. There is the increased rate of interest which will probably last for a considerable period and be more or less permanent, and which is due to destruction of capital in the course of the present war, and there is also the still higher rate of interest which is due to the temporary stringency of money due to the actual existence of the war. Ultimately no doubt the persons interested in the portions will be able to avail themselves of the former rate of interest, that is to say the increased rate of interest which is likely to be permanent; but I do not think that the trustees in their discretion would be right in insisting upon raising the money during the present circumstances so as to secure for the portioners not merely that extra rate of interest which is likely to be permanent, but also the still higher rate of interest which is a temporary rate due to the present temporary stringency. I think that in doing that they would be regarding too exclusively the interests of the portioners alone and not paying sufficient attention to the object with which the power of postponement and

the power of choosing the means of raising the money were obviously inserted in the settlement.

A second point has been dealt with, namely, that to make this mortgage would be a realization of the security within s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914. In view of the decision to which I have come on the earlier point it is unnecessary for me to express my opinion on that subject. It obviously is a most important question, because it might affect any raising of portions that may have taken place since the commencement of the war with the approbation of everybody interested under a settlement. I think therefore that I had better say nothing upon that point.

The order will be that the trustees are at liberty to postpone the raising of the portions for a term of one year, subject to the tenant for life paying as from to-day interest after the rate of 5 per cent. instead of 4 per cent., and there will be liberty to apply at the end of the year.

Solicitors: *Biddle, Thorne, Welsford & Gait; Trollope & Winckworth.*

A. C.

SARGANT J.

1916

Feb. 9, 10; *March* 10.

In re SKILLEN.

CHARLES *v.* CHARLES.

[1914 S. 1360.]

Will — Construction — "Money" — Residuary Personal Estate — Admissibility of Extrinsic Evidence.

Testatrix, who died in 1914, by her will, made in 1904, directed her debts to be paid, and gave and bequeathed her "money" unto her two nieces to be equally divided between them after 20*l.* had been paid to her executor, and expressed her wish that all her personal property in the house of either of her two nieces at the time of her death should belong to such niece.

At the date of her death the testatrix was possessed of cash in the house, money on deposit at her bank and at the Post Office Savings Bank, a sum of Consols, and household goods, together with some small personal belongings in the house of one of her nieces. On an originating summons raising the question what passed under the bequest of "money":—

Held, that extrinsic evidence was admissible to show of what property the testatrix was possessed at the date of her will as evidence of surrounding circumstances only.

Held, also, that on the true construction of the will standing alone the word "money" comprised the whole of the residuary personal estate.

Adjourned Summons.

Ann Skillen made her will dated November 10, 1904, as follows: "I appoint Henry William Charles of Ford near Arundel to be my executor and I direct that all my just debts and funeral and testamentary expenses shall be paid as soon as possible after my decease. I hereby give and bequeath unto my nieces, Alison Matilda Charles and Ellen Frost, my money to be equally divided between the two said nieces after 20*l.* is paid to my executor and I wish all my personal property in the house of either of my two nieces Alison Matilda Charles and Ellen Frost at the time of my death for them to have for their own."

This was an originating summons raising the question whether the whole of the residuary personal estate passed under the word "money." At the date of her death the testatrix was possessed of a sum of 401*l.* 5*s.* 4*d.* 2½ per cent. Consols, cash in the house, and money on deposit at her bank and at the Post Office Savings Bank,

together with household goods of small value and a few personal belongings in the house of one of her nieces. She had no real estate. The total value of the estate was about 1200*l.* It was admitted that in any case the cash and sums on deposit passed under the bequest.

At the hearing it appeared that the executor was in a position to file an affidavit showing of what property the testatrix was possessed at the date of her will, and the Court directed the affidavit to be filed without prejudice to the question of its admissibility in evidence, and under these circumstances counsel for the two nieces argued against the admissibility of the evidence.

J. M. Lightwood, for the summons.

Cyprian Williams, for Mrs. Charles and the personal representative of Mrs. Frost. The bequest of "money" under this will includes the entire residuary personal estate. The testatrix directs payment of her debts and funeral and testamentary expenses, which are payable out of the entire personal estate, and the gift of money following this direction means what is left after making these payments: *Legge* v. *Asgill* (1); *Rogers* v. *Thomas* (2); *In re Cadogan* (3); *In the Goods of Bramley* (4); *Dowson* v. *Gaskoin* (5); *Barrett* v. *White.* (6)

Extrinsic evidence is not admissible to show of what property the testatrix was possessed at the date of her will: *Higgins* v. *Dawson.* (7)

[SARGANT J. referred to *In re Layard.* (8)]

In *Stocks* v. *Barré* (9) evidence to show that the testator was possessed at the date of his will of a reversionary interest of which he was not aware was rejected.

G. E. Tyrrell, for the next of kin. Apart from any extrinsic evidence, and interpreting the word "money" by the context supplied by the will alone, the gift is a specific gift applicable only to the cash in the house and money at the bank and Post Office Savings Bank. There is no need to have recourse to authority in construing

(1) (1823) T. & R. 265, n.
(2) (1837) 2 Keen, 8.
(3) (1883) 25 Ch. D. 154.
(4) [1902] P. 106.
(5) (1837) 2 Keen, 14.
(6) (1855) 1 Jur. (N.S.) 652
(7) [1900] 2 Ch. 756, 763, 764, 768, per Rigby L.J.; [1902] A. C. 1, 8, 9, 11, per Lords Shand and Davey.
(8) (1915) 32 Times L. R. 122.
(9) (1859) Joh. 54.

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this will. *In re Cadogan* (1) is an entirely different case, the testatrix in that case having died two days after making her will. The other cases cited are distinguishable on the ground that the testator there impliedly defined "money" by directing debts to be paid—which are properly payable out of the general personal estate—and then disposing of the residue of his money after payment of debts. In the present case the gift is a specific gift of money followed by another specific gift of property in the houses of the two nieces, and the residuary personal estate is undisposed of. *Lowe* v. *Thomas* (2) is on all fours with the present case and is directly in my favour.

Extrinsic evidence is admissible for the purpose of showing the surrounding circumstances under which the will was made.

Cur. adv. vult.

March 10. SARGANT J. delivered the following written judgment: The question here is whether a bequest of "money" is a bequest of the whole residuary personal estate of the testatrix or what are the items included in the bequest if it is not residuary. It is admitted by the next of kin that the bequest even if not residuary carries cash in the house and two sums of money on deposit with the London County and Westminster Bank and the Post Office Savings Bank. The only other important asset of the estate is a sum of 401*l.* 5*s.* 4*d.* 2½ per cent. Consols, but there are also some personal effects and other small items.

The executor had made a statement, and was prepared to verify it by affidavit, as to what was the general nature and condition of the testatrix's fortune at the date of the will, and particularly as to whether she was then possessed of any Consols or other like investment. The admissibility of this evidence was contested in argument before me. I thought the evidence might be of assistance and directed that the executor should file an affidavit on the principle stated in Wigram on Extrinsic Evidence, 3rd ed. p. 80; 5th ed. p. 88, "that the Courts will, *in the first instance*, admit evidence of any facts, which, from their nature, may bear upon and influence the construction of the will, although no effect may, in the event, be given to such evidence." Of course in any case the evidence would not be material for the purpose of proving intention, but

(1) 25 Ch. D. 154.

(2) (1854) 5 D. M. & G. 315.

would at the most merely place "the Court which expounds the will in the position of the testator who made it, and the words of the will are then left to their natural operation": Wigram, 3rd ed. pp. 63, 64; 5th ed. pp. 70, 71. Evidence of surrounding circumstances was given in the case of bequests of "stock," "jewels," or "household furniture"—Wigram, 3rd ed. p. 64; 5th ed. p. 71, citing *Colpoys* v. *Colpoys* (1)—and "books"—*Willis* v. *Curtois*. (2) And in the recent and important case of *In re Layard* (3), now under appeal, the like evidence seems to have been received without objection in the case of bequests of "all my pictures (except portraits)" and "all my family and other portraits." Further, in *In re Cadogan* (4), a case directly dealing with the effect of a bequest of "money," Kay J. not only received but attached importance to evidence as to the state of the testatrix's property at the date of her will, though he justified this, partly at any rate, on the somewhat doubtful ground that the will was made in a last illness with the expectation of death.

The evidence that has since been filed shows that the precise sum of Consols now in question belonged to the testatrix at the date of her will as well as at the date of her death, and that the other items of her property were substantially the same at both dates. This evidence is, I think, admissible and I accept it. But I attach little importance to it, and the conclusion I have come to is the same at which I should have arrived had the evidence been excluded.

It may perhaps be doubtful on the cases whether the term "money" alone and without the aid of any context is sufficient to pass the whole personal estate. For the decision to that effect of Kay J. in *In re Cadogan* (4) has been doubted by Stirling J. in *In re Buller*. (5) But it is clear that a comparatively slight context one way or the other may either restrict the term "money" within comparatively narrow limits or may assist it so as clearly to include the whole personal estate or the residue of the personal estate. For instance, the gift of the residue of "money" after provision for the payment of debts or legacies is enough, since it is the whole personal estate that is liable for such payment: *Legge* v. *Asgill* (6)

(1) (1822) Jac. 451.
(2) (1838) 1 Beav. 189, 193.
(3) 32 Times L. R. 122.
(4) 25 Ch. D. 154.
(5) (1896) 74 L. T. 406.
(6) T. & R. 265, n.

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and other cases. Further, the exception of shares in a particular company from a gift of "money" raises a sufficient implication to make money include the general personal estate: *In re Buller* (1), while on the other hand subsequent independent specific or general bequests indicate that the previous gift of money must be read in a much more limited sense: *Lowe* v. *Thomas.* (2)

Here reliance was placed for the legatee on the express direction to the executor to pay debts as bringing the case within the principle of *Legge* v. *Asgill* (3) and other cases of this kind. But I am inclined to think the indication (if any) to be derived from this direction is hardly sufficient for the purpose. And the case seems to me really to turn on the way in which I ought to read the final direction in the will, namely, "I wish all my personal property in the house of either of my two nieces Alison Matilda Charles and Ellen Frost at the time of my death for them to have for their own." Is this an independent gift of something which the testatrix has not given before, in which case the principle of *Lowe* v. *Thomas* (2) would apply, or is it a qualification of a more extensive previous gift so as to raise an implication that property of the kind to which the qualification extends has already been dealt with by the will?

On the whole I have come to the conclusion that the latter is the true interpretation of the words in question. The testatrix's attention being directed to her personal chattels or belongings, she can hardly have intended to deal solely with such part of them as should happen to be in the house of either of her nieces and to leave the rest of them undisposed of. And, further, the use of a word of recommendation rather than of an out and out gift points in the same direction. The true meaning of the words seems to be that the testatrix, assuming she has already given all her personal chattels to her two nieces in equal shares, desired them to allow any particular chattel at the house of either of them to be the sole property of the niece whose house it is.

I propose, therefore, to declare that the bequest to the two nieces includes the whole residuary personal estate of the testatrix.

Solicitors: *Mills & Morley, for E. J. Bechervaise, Portsmouth.*

(1) 74 L. T. 406. (2) 5 D. M. & G. 315.
(3) T. & R. 265, n.

A. C.

SARGANT J.

1916

March 1, 2, 13.

In re SMITH.

PRADA *v.* VANDROY.

[1915 S. 3538.]

Will—Construction—Provision against Lapse by Death of "Legatee"—Whether applicable to Residuary Legatee—Bequest by Codicil.

Testatrix by her will made in 1894 gave a number of specific and pecuniary legacies and disposed of her residuary personal estate, and directed that all bequests and legacies given to married women should be for their separate use, and that "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." The testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will and any previous codicil or codicils, and died in 1915:—

Held, that the provision in the will against lapse extended to the residuary bequest.

Held, also, that it equally extended to a bequest contained in a codicil, the expression "this my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will and codicils at the date of the testatrix's death.

ADJOURNED SUMMONS.

Juliana Smith by her will dated June 6, 1894, gave a number of specific legacies to her cousins, including her cousin Marie Vandroy. She then gave a number of pecuniary legacies and bequeathed to three persons the moiety belonging to the testatrix of certain leasehold premises in Deal, and also the sum of 150*l.* to enable them to acquire the remaining moiety of the same premises (which formerly belonged to the testatrix's brother) from the residuary legatees under the will of her said brother. She then directed her executors to sell and convert her estate not specifically bequeathed and to pay thereout her debts, funeral and testamentary expenses, and the said pecuniary legacies; and as to all the rest and residue of her estate after the aforesaid payments gave and bequeathed the same unto her said cousin Marie Vandroy absolutely, and continued: "I declare that all bequests and legacies given to married

SARGANT J. 1916 SMITH, *In re.* PRADA *v.* VANDROY.

women shall be for their respective separate use and may be paid to them on their receipt alone and without the concurrence or assent of their husbands and notwithstanding their dissent. And I declare that no legacy given by this my will shall lapse by reason of the death of the legatee before me, but that the same shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such legatee."

The testatrix made seven codicils to her will, the following statement of which is taken from his Lordship's written judgment:—

"A first codicil dated in 1895 gives additional pecuniary legacies to two legatees named in the will and a specific legacy to a fresh legatee, and further declares that a specific legacy and a pecuniary legacy of 150*l.* given to three legatees named in the will are to be taken by them as tenants in common, and further declares that all legacies and bequests given by her will or by her codicil shall be free of duty.

"A second codicil dated in 1897 gives a legatee named in the will a larger legacy by way of substitution.

"A third codicil dated in 1898 revokes the appointment of one of the executors named in the will and a legacy of 50*l.* thereby given to him and appoints another person executor and gives him a legacy of 50*l.*

"A fourth codicil dated in 1900 substitutes for the legacy of 150*l.* given to the three legatees before referred to a legacy of 300*l.*, but declares that if either of the legatees should predecease the testatrix their specific legacy and the increased legacy of 300*l.* shall go to the survivors or survivor. The same codicil also substitutes a larger legacy for that previously given in the case of another pecuniary legatee.

"A fifth codicil dated in 1906 is entirely devoted to revoking numerous specific and pecuniary legacies given by the will, probably because the legatees had already predeceased the testatrix.

"A sixth codicil dated in November, 1908, appoints a new executor in the place of both the executors whose appointment was revoked by the third codicil and of the executor who had been appointed by the third codicil, both of whom are mentioned in this codicil as being dead. It further revokes the legacy to the latter of

50*l.* and makes a specific gift to the testatrix's cousin W. H. Hayman of certain chattels she had marked as given to him.

"A seventh codicil dated in December, 1908, bequeaths to a Mr. Eldridge certain articles and pictures which the testatrix has marked as given to or for him, and in the event of his dying before the testatrix bequeaths the same to his daughter Beatrice May Eldridge. It then makes a specific bequest to the testatrix's servant Ellen Swann, who had taken other benefits under the will and previous codicils. It then—and this is the bequest in question—bequeaths to Mr. W. H. Hayman 'my leasehold house, No. 55, Oakley Square, and all the contents thereof except the silver plate and except such pictures and articles as I have by my said will or any codicil thereto otherwise disposed of or which I may hereafter dispose of.' Each codicil contains an express formal clause confirming in all other respects the testatrix's will and any previous codicil or codicils, mentioning indeed in each case after the first the exact number of the previous codicils."

The testatrix died in 1915, aged ninety-nine years. Many of her legatees, including Marie Vandroy, the residuary legatee, and Mr. W. H. Hayman, died in her lifetime.

This was an originating summons raising (inter alia) the questions (1.) whether the provision in the will against lapse by the death of the "legatee" in the lifetime of the testatrix applied to the case of the death of the residuary legatee, and (2.) whether it applied to the case of the bequest of the leasehold house and the contents made by the seventh codicil. The two questions were argued separately.

Percy Wheeler, for the plaintiffs.

Maugham, K.C., and *Warwick Draper*, for the administrator of the residuary legatee. The provision against lapse is effective—*In re Greenwood* (1)—and applies to the case of the death of the residuary legatee just as much as to the case of the death of a specific or pecuniary legatee. The motive is the same in each case. The decision and general reasoning of Sir John Romilly M.R. in *Ward* v. *Grey* (2) are in our favour. So, too, are the cases under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40, where the words "or any legacy" have been held to include a

(1) [1912] 1 Ch. 392. (2) (1859) 26 Beav. 485, 492, 493.

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residue or share of residue: *Prior* v. *Horniblow* (1); *Christian* v. *Devereux.* (2) In *Gaskin* v. *Rogers* (3), which was a case of marshalling in favour of charities, Wood V.-C. says that a bequest of a share "of a man's residuary estate is a legacy to all intents and purposes." See, too, *In re Davis.* (4)

Owen Thompson, for the next of kin. The residue is undisposed of. I do not dispute the validity of the provision against lapse, but it has no application to the residuary gift. A direction in a will concerning a "legatee" prima facie means a specific or pecuniary and not a residuary legatee: Jarman on Wills, 6th ed. p. 1061; and see *In re Elcom* (5) and *In re Aiken.* (6) The cases under the Real Property Limitation Act are not in pari materia and turned on the fact that the statute contains no reference to residue at all. *Ward* v. *Grey* (7) was a very special case and turned on the general intention shown by the fourth codicil in that case. It is clear that in the first codicil to this testatrix's will dealing with duty the word "legacy" cannot include residue, and that is an indication that it bears no wider meaning in the will itself. [He also referred to Theobald on Wills, 7th ed. p. 211, and Carson's Real Property Statutes, 2nd ed. p. 190.]

J. M. Gover for another party.

SARGANT J. The first and most important point which arises upon this summons is whether, on the true construction of the testamentary instruments of the testatrix, a gift of residue to a lady who predeceased the testatrix is saved by a general clause in the will applying to legacies. The testatrix lived to the age of ninety-nine years, and in consequence her will became very much out of date, and most of the legatees named in it predeceased her. The will is a comparatively simple one, and the general scheme of it is as follows: [His Lordship stated the terms of the will as above set out, observing that Marie Vandroy was married to a Frenchman, and that the clause relating to the separate use, though it did not come directly in question, was of great importance for the purpose of construing the immediately following provision against lapse, and

(1) (1836) 2 Y. & C. Ex. 200.
(2) (1841) 12 Sim. 264.
(3) (1866) L. R. 2 Eq. 284, 294.
(4) [1891] 3 Ch. 119, 124.
(5) [1894] 1 Ch. 303.
(6) [1898] 1 I. R. 335.
(7) 26 Beav. 485.

continued :] The efficacy of such a substitutionary gift is not questioned, and in my opinion could not successfully be questioned having regard to the decision of Parker J. in *In re Greenwood.* (1) The point raised is this : Does the word " legacy " in this clause apply only to the specific and pecuniary legacies previously given by the will, or does it also apply to the gift of residue to the residuary legatee ?

In my opinion it clearly applies to the residuary gift as well as to the specific and pecuniary legacies. It is noticeable that the two clauses which I have read, one relating to the separate use and the other to the death of the legatee, immediately succeed the gift of residue ; and of course in this, as in most other wills, the gift of residue is obviously regarded as the most important disposition in the will. The testatrix was a very old lady, and it seems to me impossible to suppose that when by words immediately following the gift of residue she provided that all bequests and legacies given to married women should be for their separate use she was intending to apply that merely to the comparatively unimportant pecuniary and specific legacies given by the previous part of the will and not to the much more important immediately preceding gift of residue. If that is so with regard to that clause it seems to me that any difficulty which might otherwise arise is removed as to the following clause ; but, quite apart from that consideration, it is clear that the reason for which the second clause, relating to the avoidance of lapse and the substitution of the legal personal representative, is inserted in the will applies quite as much to the residuary gift as to any one of the preceding specific or pecuniary bequests. In my judgment it would be a wrong interpretation of the will of this testatrix to suppose that she carefully provided that no one of these unimportant specific and pecuniary legacies should lapse by the death of the legatee in her lifetime, and did not intend to make a similar provision with regard to the more important and more immediately preceding gift of residue.

That is my view of the effect of the general language of the will ; but it has been pressed upon me that the word " legacy " is not naturally capable of including a residuary gift and that it must be limited prima facie to specific or pecuniary legacies in the ordinary

(1) [1912] 1 Ch. 392.

SARGANT J. 1916 SMITH, *In re.* PRADA *v.* VANDROY.

strict sense. I do not take that view. Even if some small context were needed to extend the meaning of the word, I find a sufficient context for that purpose in the general arrangement of this will; but apart from that it appears to me that the authorities to which I have been referred sufficiently establish that the word "legacy" may be taken in its broad sense to include a residuary legacy as well as a specific or pecuniary legacy in cases where the reason for the provision in question extends as fully to the former kind of legacy as to the latter kind of legacy. The point has in fact arisen under the Real Property Limitation Act, 1833, s. 40 of which provides that after a certain time an action shall not be brought for the recovery of a legacy. It was held without the slightest difficulty in the case of *Prior* v. *Horniblow* (1) that the word in the statute was sufficient to cover a gift of an entire residue, and in the following case of *Christian* v. *Devereux* (2) an opinion was expressed that it was sufficient to cover a share of residue. And in the latter case I rather gather that this opinion was based on the argument put forward by the respondents there that there was the same reason for making the statutory provision with regard to a share of residue as there was with regard to a legacy, and that therefore there was no sufficient reason for confining the word "legacy" to a specific or pecuniary legacy as distinguished from a residuary legacy.

With regard to wills the question was considered in the case of *Ward* v. *Grey*. (3) It may be that in that case the principal reason for coming to the conclusion was that the testator by the use of the word "benefits" in his codicil showed an intention that the term "legacy" should apply to every benefit given by the will, which would of course include a residuary gift; but I think that the learned judge who decided that case was also impressed with this, that the testator's reason for making the persons who took under the will pay the 1 per cent. in question applied quite as much to the residuary legatee as to the pecuniary legatee—namely that they would all alike have failed to receive anything under his will had it not been for the protection afforded to this country by the victories gained by Lord Nelson.

Two authorities were cited by Mr. Owen Thompson against that

(1) 2 Y. & C. Ex. 200. (2) 12 Sim. 264, 271.
(3) 26 Beav. 485, 492, 493.

view, but in my opinion neither of them applies to the present case. *In re Elcom* (1) was a case dealing with the meaning of the phrase "pecuniary legacy," which is a much narrower phrase than the word "legacy," and the decision that the phrase "pecuniary legacy" does not include a share of residue is really of no assistance for deciding that the word "legacy" alone does not include a share of residue. In the other case—*In re Aiken* (2)—there was a special context in the will which showed that the provision there made was not intended to apply to a share of residue. Here, as in *Ward* v. *Grey* (3), the word "legacy" is used in connection with the term "legatee," and, as in *Ward* v. *Grey* (3), it seems to me that the circumstances of the case also assist the construction at which I have arrived. I feel no doubt that the testatrix intended, and I think that she sufficiently indicated her intention, that this provision should apply as well to the residuary gift to Madame Vandroy as to the other gifts given by the will, and therefore I declare that her husband, as her administrator, is entitled to the residue.

The second question was then argued.

Maugham, K.C., and *Warwick Draper*, for the administrator of the residuary legatee. The provision against lapse applies only to benefits taken under the will itself. The words "by this my will" indicate the particular instrument. The confirmation of the will by the codicils does not affect the question, since that has no bearing on the true construction of the will, though according to the old law relating to real estate a codicil confirming the will had the effect of a republication of the will so as to include after-acquired real estate: Hawkins on Wills, 2nd ed. p. 28; *Acherley* v. *Vernon* (4); *Buckenham* v. *Cook.* (5) A somewhat similar question to the present has arisen, whether a direction in a will that legacies are to be paid free of duty extends to legacies given by a codicil. *Early* v. *Benbow* (6) is in our favour. See, too, *Bonner* v. *Bonner.* (7) [They also referred to *Jauncey* v. *Attorney-General* (8) and *In re Sealy* (9).]

(1) [1894] 1 Ch. 303.
(2) [1898] 1 I. R. 335.
(3) 26 Beav. 485.
(4) (1725) 3 Bro. P. C. 85.
(5) (1706) Holt, 248.
(6) (1846) 2 Coll. 342, 354.
(7) (1807) 13 Ves. 379.
(8) (1861) 3 Giff. 308.
(9) (1901) 85 L. T. 451.

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Darlington, for the executors of W. H. Hayman. The provision against lapse contained in the will applies equally to the case of a legacy given by a codicil. *Jauncey* v. *Attorney-General* (1) is in my favour. The words " this my will " in the clause in question are not to be construed in a narrow sense as referring to the particular instrument only, but mean all the documents constituting the testatrix's testamentary disposition at the date of her death : *Green* v. *Tribe* (2), per Fry J. ; *Lemage* v. *Goodban*. (3)

Cur. adv. vult.

March 13. SARGANT J. delivered the following written judgment :—On the construction of this will I have already decided that the saving clause providing against the lapse of legacies given by the will extends to and includes the residuary bequest contained in the will. I have now to decide whether the clause applies to and saves a bequest by the seventh codicil to a Mr. W. H. Hayman, who predeceased the testatrix, of a leasehold house, No. 55, Oakley Square, and the bulk of its contents. [His Lordship read the clause in the will and stated the effect of the seven codicils as above set out, and continued :]

It is admitted that, so far as the legacies given by the various codicils are additional or substitutional, the legal personal representatives of any deceased legatees have the benefit of the saving clause contained in the will.

The question is whether the saving clause applies to the case of Mr. W. H. Hayman, who did not take under the will, but took originally under the sixth codicil and ultimately under the seventh codicil.

I am of opinion that this question must be answered in the affirmative. It is well settled law that when a codicil expressly confirms a will the effect is, in the words of North J. in *In re Champion* (4), " to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date." This

(1) 3 Giff. 308.
(2) (1878) 9 Ch. D. 231, 234.
(3) (1865) L. R. 1 P. & M. 57.
(4) [1893] 1 Ch. 101, 109.

decision was affirmed in the Court of Appeal, and the principle has been given full effect to in such cases as *In re Rayer* (1) and *In re Fraser.* (2) It is indeed urged here that the words "by this my will" point to a particular instrument or writing, namely, the will itself, and that therefore the saving clause is limited by its very terms to the legacies given by the will itself. But I think that this is too narrow a construction. In my view the will itself is alone named in the clause merely because at the time that was the only instrument containing the testatrix's testamentary dispositions. I cannot find in the phrase any intention to denote the particular instrument alone or to exclude from the application of the clause any legacies which should under codicils confirming the will form part of the testatrix's ultimate testamentary dispositions. The will being brought down to date by the confirming codicils and forming together with them one complete disposition, the legacies given by the codicils come, in my judgment, within the description legacies "given by this my will." But there are also in the codicils themselves some indications pointing in the same direction. It is difficult to understand why the sixth codicil should revoke a legacy to an executor who is expressly stated to be dead unless the testatrix assumed that but for the revocation his legal personal representatives would take under the saving clause. And the same remark applies to the revocation of numerous legacies by the fifth codicil, if I am right in my conjecture that the legatees in question or some of them were then dead. Further, it is obvious from the careful provisions which are made in the fourth and seventh codicils for the event of certain legatees predeceasing the testatrix that this possibility was still definitely present to the mind of the testatrix, and it is hardly possible that she meant the provision on that point in the will not to apply generally to the other gifts she was making by one or other of these two codicils or by previous codicils. Indeed, the provisions of the fourth and seventh codicils are most naturally read as special provisions made with regard to particular legacies in lieu of the general provisions that would otherwise be applicable under the will.

I propose, therefore, to declare in answer to this question that the benefits given to W. H. Hayman by the seventh codicil

(1) [1903] 1 Ch. 685. (2) [1904] 1 Ch. 726.

SARGANT J. 1916 SMITH, *In re.* PRADA *v.* VANDROY.

have not lapsed but take effect in favour of his legal personal representatives.

Solicitors: *Walter Maskell & Co.; Hutchison & Cuff; Shepheards & Walters; Rawson & Stevens; Kingsford, Dorman & Co., for J. J. Williamson, Deal.*

A. C.

PETERSON J. 1916 *Jan.* 27, 28, 31.

FOSTER *v.* FOSTER.

[1915 F. 388.]

Company—Chairman—Managing Director—Delegation of Directors' Powers—Duration of Office—Remuneration of Managing Director—Appointment by Directors—Contract with Company—Interested Director prohibited from voting—Invalid Appointment—Power of General Meeting to confirm—Right of Minority to sue—Remuneration of Directors—Power of Company to reduce.

The articles of association of the defendant company provided (inter alia) that every share should confer one vote both at general meetings of the company and at meetings of the directors, and (by article 89) that the business of the company should be managed by the directors. Article 93 provided that a director might contract with the company, but prohibited a director from voting in respect of any contract in which he was interested, and article 99 empowered the directors from time to time to appoint one of their body to be managing director for such period and at such remuneration as they thought fit.

The plaintiff was appointed director by the company at a remuneration of 300*l.* per annum and chairman and managing director by the board of directors, but without remuneration and for no fixed period. Two years later, at a board meeting of the three directors, the defendant Mrs. F., supported by the third director but opposed by the plaintiff, appointed herself chairman in his place and joint managing director with him, in both cases without remuneration. At a subsequent extraordinary general meeting the company reduced the plaintiff's remuneration as director from 300*l.* to 25*l.* per annum. Some time afterwards, at a board meeting of three directors, Mrs. F., supported by the third director, carried resolutions removing the plaintiff from the office of managing director and appointing herself sole managing director at a substantial remuneration. The plaintiff opposed both resolutions and, upon the latter, demanded a poll, with the result that by means of

Mrs. F.'s own votes there was a majority in favour of the resolution appointing her.

In an action by the plaintiff in his individual capacity and also on behalf of the shareholders other than Mrs. F. :—

Held : (1.) That the mere appointment of the plaintiff to be chairman and managing director did not entitle him to fill those offices for as long as he retained his directorship.

(2.) That when no remuneration was attached to the office, the appointment as chairman or managnng director was merely a delegation of their powers by the directors to the director so appointed, and did not constitute a contract between him and the company within article 93 ; *secus*, where remuneration was attached, and that consequently the appointment by Mrs. F. of herself as sole managing director was within the prohibition of that article and invalid.

In re New British Iron Co. [1898] 1 Ch. 324 applied.

(3.) (*a*) That it was competent for the company in general meeting, notwithstanding article 99, to waive the irregularity occasioned by Mrs. F. voting contrary to the prohibition, and to confirm the resolution appointing her, and that the irregularity was, therefore, not of such a character as to give a dissentient minority any right to sue.

Observations of Lord Davey in *Burland* v. *Earle* [1902] A. C. 83 applied.

Menier v. *Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350 and *Thomas Logan, Ld.* v. *Davis* (1911) 104 L. T. 914 distinguished.

(*b*) That the principle of *Barron* v. *Potter* [1914] 1 Ch. 895 also applied, and that, the directors being in the circumstances unable to exercise the powers conferred upon them by the articles, the company in general meeting could make the appointment.

(4.) That the company had power to reduce the remuneration of an existing director and to discriminate between directors in respect of their remuneration ; and that the exercise of such power was not part of the business of the company, the management of which was by article 89 delegated to the directors so as to render the same exclusively exercisable by them.

WITNESS ACTION.

The plaintiff, Bernard Harvey Foster, and the defendant Mary Elizabeth Foster (widow) were directors of the defendant company, W. Foster & Son, Limited (hereinafter called " the company ").

The company was incorporated in 1892 with a capital of 30,000*l.* divided into 1000 preference and 2000 ordinary shares of 10*l.* each. The plaintiff and Mrs. Foster each held 500 of the preference shares, and the former held 648 and the latter 848 of the ordinary shares. Of the remaining 504 ordinary shares 200 were held by two persons

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who supported Mrs. Foster and 304 were held by six other persons who supported the plaintiff, so that the majority of the ordinary shares, 1048 as against 952, supported, or belonged to, Mrs. Foster.

The material provisions of the articles of association of the company were as follows :—

" 71. Every share shall confer one vote, both at general meetings of the company, and at meetings of the directors"

" 86. The number of directors shall be not less than two nor more than five."

" 88. The remuneration of the directors shall from time to time be fixed by the said George Harvey Foster, during his life and membership in the company ; otherwise by the company.

" 89. Subject to the preceding clauses, the business of the company shall be managed by the directors, who may pay all such expenses of, and preliminary and incidental to, the promotion, formation, establishment, and registration of the company as they think fit, and may exercise all such powers of the company, and do, on behalf of the company, all such acts as may be exercised and done by the company, and as are not by the statutes or by these presents required to be exercised or done by the company in general meeting, or by the said George Harvey Foster, or the manager or managers, subject nevertheless to any regulations of these presents, to the provisions of the statutes, and to such regulations or provisions as may be prescribed by the company in general meeting. . . . ."

" 93. A director may contract with the company as vendor, purchaser, or otherwise, and may retain the profits of every such contract without liability to account therefor, but a director shall not vote in respect of any contract in which he is interested."

" 95. The office of director shall be vacated : (*a*) If he become bankrupt, or suspend payment, or compound with his creditors. (*b*) If he be found lunatic or become of unsound mind, or go to reside permanently outside of the United Kingdom. (*c*) If he cease to hold the qualifying number of shares. (*d*) If by notice in writing to the company he vacates his office.

" 96. Until otherwise determined by extraordinary resolution, the directors for the time being shall continue to hold office subject only to clauses 95 and 97 hereof.

"97. The company at any general meeting shall fill up any vacancies in the office of director, and may, by extraordinary resolution, remove any director other than the said George Harvey Foster before the expiration of his period of office, and appoint another person in his stead."

"99. The directors may, subject to the preceding clauses, from time to time appoint any one or more of their body to be managing director or directors, for such period, at such remuneration, and upon such terms as the directors think fit.

"100. Two directors shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a casting vote."

"102. The directors may elect a chairman of their meetings, and determine the period for which he is to hold office . . . ."

The articles further provided that, subject to a few definitions immaterial for the purposes of this report, any words defined in the statutes should, if not inconsistent with the subject or context, bear the same definition in those presents.

George Harvey Foster had died before the events hereinafter stated.

At an extraordinary general meeting of the company held on January 25, 1911, it was resolved (1.) that the plaintiff be appointed a director of the company with remuneration at the rate of 100*l.* per annum; (2.) that the remuneration of Mrs. Foster as a director of the company should be at the rate of 100*l.* per annum; and (3.) that the directors should be paid all their travelling and other expenses properly and necessarily expended by them in and about the business of the company, including their travelling and other expenses incurred in attending the board meetings of the company.

The plaintiff's remuneration as director was subsequently increased to 300*l.* per annum.

At a board meeting held later on the same day Mrs. Foster resigned the office of chairman of the directors and the plaintiff was appointed chairman.

At a board meeting held on August 14, 1911, the plaintiff was appointed managing director of the company and Mrs. Foster was appointed sub-managing director of the company.

There was no remuneration attached to the office of managing

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director at this time, the remuneration being in respect of the occupation of the post of director.

At a board meeting held on July 30, 1913, at which the three directors were present,—namely, the plaintiff, Mrs. Foster, and Mr. Hardy—Mrs. Foster proposed and Mr. Hardy seconded that Mrs. Foster be appointed chairman in the place of the plaintiff. When the plaintiff asked the reason for this proposal Mrs. Foster explained that she had given up the chairmanship in the plaintiff's favour in January, 1911, in reliance upon the assurance of the plaintiff's solicitor that the plaintiff would work amicably with her, but he had failed to do so, and she therefore claimed to be reinstated. The plaintiff refused to put the resolution to the meeting, and it was therefore put to the meeting by Mrs. Foster and carried. Mrs. Foster thereupon took the chair. Mr. Hardy then proposed and Mrs. Foster seconded that Mrs. Foster be appointed joint managing director of the company along with the plaintiff, and this was carried. The plaintiff voted against both these resolutions.

At the annual meeting of the shareholders held on August 11, 1913, Mr. Hardy was re-elected an ordinary director of the company, whereupon Mrs. Foster moved that he be paid a remuneration of 150*l.* a year, including expenses, and this was seconded. The plaintiff moved as an amendment that Mr. Hardy's remuneration be 25*l.* a year, and this was seconded, but on a poll the amendment was lost (Mr. Hardy voting against it) and the original resolution was carried.

At an extraordinary general meeting of the company held on August 21, 1913, Mr. Myers and Mr. Devlin were elected directors of the company with remuneration at the rate of 100*l.* a year each, and a resolution was also carried reducing the remuneration payable to the plaintiff as a director of the company to 25*l.* a year. No one voted against any of the resolutions.

At a board meeting held on January 19, 1915, at which the plaintiff, Mrs. Foster, and Mr. Myers were present, resolutions were passed terminating as from that date the appointment of the plaintiff as managing director of the company and his subsequent appointment as joint managing director with Mrs. Foster, and appointing Mrs. Foster sole managing director of the company for a period of ten years from that date at a remuneration at the rate of 300*l.* per

annum, rising, in the event of certain specified increases in the net profits in any one year, to 400*l.* and possibly 500*l.* The plaintiff voted against both the resolutions, and on demanding a poll upon the latter resolution the result was 1448 in favour of the resolution and 1148 against it, whereupon the chairman declared it carried.

The writ in this action was issued on March 16, 1915.

The plaintiff, suing on behalf of himself and all other shareholders in the company except Mrs. Foster and also in his individual capacity, claimed declarations that the resolutions above set out and passed at the board meetings of July 30, 1913, and January 19, 1915, and at the extraordinary general meeting of August 21, 1913, reducing his remuneration to 25*l.*, were invalid; injunctions restraining Mrs. Foster from acting as chairman, joint managing director, and sole managing director of the company, and from excluding the plaintiff from or interfering with him in his offices as chairman and managing director; and payment of the arrears of remuneration due to him as director.

On August 5, 1915, a general meeting of the company was convened for the purpose of confirming the resolutions which had been passed by the directors in January, 1915. At the trial there was a considerable conflict of evidence whether the confirmatory resolutions were duly passed at this meeting, and in the circumstances his Lordship was unable to come to the conclusion that they were duly passed.

Tomlin, K.C., and *Hodge*, for the plaintiff. The first objection taken relates to the proceedings at the board meeting of July 30, 1913, at which the three directors were present. It was not open to the directors at that meeting to remove the plaintiff from the chairmanship or to appoint a managing director jointly with him. His original appointment as chairman and managing director was not limited as regards time, and we submit that he was appointed to those offices for so long as he continued to be a director of the company.

Further, having regard to article 93, it was improper for Mrs. Foster to vote in favour of her own appointment as chairman and joint managing director. Such appointments possess a contractual element similar to that which exists in the appointment of a director between whom and the company there is a contract: *In re New*

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British Iron Co. (1); and by virtue of article 93 a director is prohibited from voting in respect of any contract in which he is interested. The articles provide that two directors shall be a quorum at board meetings, and that gives rise to this further objection, that as two out of the three directors present at this meeting were interested in this contract—namely, Mrs. Foster, who could not support, and the plaintiff, who could not oppose, the resolutions in question—there was consequently no quorum, and therefore the resolution was invalid: *In re Greymouth Point Elizabeth Ry. and Coal Co.* (2)

The plaintiff also contends that it was not competent to the company by the ordinary resolution of August 21, 1913, to reduce his remuneration as a director and to discriminate between the directors as to their remuneration. When a director is appointed at a remuneration there is a contract between him and the company, and we submit that there was no implied proviso that the contract could be modified. If it was competent for the company to make the reduction, then we submit that it was effected by the preponderance of the votes of Mrs. Foster and was not done in good faith and is invalid.

The plaintiff objects to the resolutions of January 19, 1915, on the ground that his appointment as managing director was for the term of his directorship, and that, having regard to article 93, Mrs. Foster could not vote in favour of her own appointment. The proceedings at that meeting really constituted one transaction, and Mrs. Foster not being entitled to vote in respect of it, there was no quorum. The board has the power of appointing the chairman and managing director, and the company in general meeting has no control over that power, which under article 99 is vested in the directors: *Thomas Logan, Ld.* v. *Davis.* (3) The plaintiff can only be removed by an extraordinary resolution.

The plaintiff is entitled to sue in respect of the wrong done to him personally by depriving him of his appointments and by keeping him out of them, and he is also entitled to sue on behalf of the other shareholders where they constitute a minority without any redress otherwise: Buckley on the Companies Acts, 9th ed. p. 613.

(1) [1898] 1 Ch. 324. (2) [1904] 1 Ch. 32.
(3) 104 L. T. 914.

Hughes, K.C., and *W. G. Hart* (*J. M. Gover* with them), for the defendant Mrs. Foster. The main objection to the resolutions passed at the board meeting of July 30, 1913, is based on the provisions of article 93, but that article only refers to contracts with the company and has no application to the appointment of a managing director without salary, which is a matter for the directors alone under article 99, and it is for them to decide which of themselves is to be managing director. There is, in fact, no substance in the objection, because it is open to the company in general meeting to waive any irregularity and confirm the appointment, and if that has not already been done by the meeting of August 5, 1915, another meeting can be called for the purpose. "No mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall* v. *Gardiner* (1)": per Lord Davey in *Burland* v. *Earle*. (2) There is nothing here that is ultra vires, but only a mere irregularity which the majority of the shareholders can condone and confirm.

Further, there is nothing in the articles to show that the office of chairman or managing director is permanent. The appointment is only until another resolution is passed appointing a substitute; there must be some means of removing or superseding an officer who may have become unsuitable. There is no extra remuneration attached to either office; it only involves a further duty, and cannot possibly be a contract from which any profit is derived within the meaning of article 93.

It is within the powers of the company from time to time to fix the remuneration of the directors under the provisions of the article, and the resolution at the extraordinary general meeting on August 21, 1913, reducing the plaintiff's remuneration from 300*l.* to 25*l.* was valid.

Then objection is taken to the resolutions passed at the board meeting of January 19, 1915, on the ground that there was no quorum present, inasmuch as the plaintiff and Mrs. Foster were interested parties and could not vote either for the termination of the appoint-

(1) (1875) 1 Ch. D. 13, 25. (2) [1902] A. C. 83, 93, 94.

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ment of the plaintiff as managing director or the appointment of Mrs. Foster in his place. But all these regulations are for the protection of the members of the company, and the majority can waive the non-observance of them : *Burland* v. *Earle* (1) ; *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.* (2) ; and if the majority of the members have approved, affirmed, and adopted the resolutions the Court will not, in the absence of fraud, interfere : *Mozley* v. *Alston* (3) ; *Foss* v. *Harbottle* (4) ; *MacDougall* v. *Gardiner* (5) ; *Harben* v. *Phillips* (6) ; and where there is a deadlock at the board meetings the company itself can exercise the powers of the directors : *Barron* v. *Potter.* (7)

P. F. S. Stokes, for the defendant company.

Tomlin, K.C., in reply. The cases which show that a minority cannot sue in respect of irregularities which can be affirmed and adopted by a majority do not apply to a case like this where the majority are helping themselves to the property of the company. That case is expressly excluded from the general rule by Lord Davey in *Burland* v. *Earle* (8), and he refers to *Menier* v. *Hooper's Telegraph Works* (9) as an example.

[PETERSON J. referred to *Dominion Cotton Mills Co.* v. *Amyot.* (10)]

In that case no want of bona fides was shown, but in this case the defendants are taking part of the assets of the company and are within the principle of *Menier* v. *Hooper's Telegraph Works.* (9)

[PETERSON J. In *Normandy* v. *Ind, Coope & Co.* (11) it was held that the minority could not maintain an action.]

That case rested upon the distinction between the powers of the company and the powers of the directors. In the present case the appointment of a managing director was not within the powers of the company. Article 99 is not expressed to be subject to the preceding articles, and the company could not in general meeting have passed a resolution appointing Mrs. Foster to be managing director.

[PETERSON J. That appears to be contrary to *Barron* v. *Potter.* (7)]

(1) [1902] A. C. 83, 93, 94.
(2) [1909] 1 Ch. 267.
(3) (1847) 1 Ph. 790.
(4) (1843) 2 Hare, 461.
(5) 1 Ch. D. 13.
(6) (1883) 23 Ch. D. 14.
(7) [1914] 1 Ch. 895.
(8) [1902] A. C. 83, 93.
(9) L. R. 9 Ch. 350.
(10) [1912] A. C. 546, 551.
(11) [1908] 1 Ch. 84.

But there the position was that there never could be a quorum of directors, and in that state of things nothing could be done. That is not so here; the directors did purport to pass this resolution; the board can act, and possibly at a new meeting will act, effectively. The principle of *Barron* v. *Potter* (1) does not apply until it is shown that the board cannot act.

Then upon the question of remuneration. That is fixable by the company from time to time under article 88, but is one of the powers delegated to the directors by article 89, and being thus delegated is not exercisable by the company: *Quin & Axtens, Ld.* v. *Salmon* (2); and it is only by extraordinary resolution that the company can deal with this question at all, and the company had no power in general meeting to alter the remuneration. There was a complete delegation of the powers of the company to the directors, and they are not left to be exercised by the company in general meeting.

Cur. adv. vult.

Jan. 31. PETERSON J. This is an action in which Mr. Bernard Harvey Foster sues in a representative capacity on behalf of himself and all other the shareholders in the defendant company, except the defendant Mary Elizabeth Foster, and also in his individual capacity. The defendants are Mrs. Mary Elizabeth Foster and W. Foster & Son, Limited. [His Lordship then referred to the various meetings and resolutions above mentioned, and continued:]

So far as voting was concerned the position was this: The capital consisted of 2000 ordinary shares of 10*l.* each and 1000 preference shares of 10*l.* each. The preference shares were divided equally between the plaintiff and Mrs. Foster. The ordinary shares were held in this way: Mrs. Foster held 848 shares, and she had in addition as her supporters two directors who held 100 ordinary shares each, making 1048. The plaintiff held 648 shares, and the balance of 304 shares was held by six shareholders, who, I am told, were supporting the plaintiff. The result, therefore, was that so far as the preference shares were concerned they were divided equally between the plaintiff and Mrs. Foster, and, so far as the ordinary shares were concerned, on those figures Mrs. Foster held or had the

(1) [1914] 1 Ch. 895. (2) [1909] A. C. 442.

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support of 1048 shares, while the plaintiff held or had the support of 952. The majority, therefore, was either with or supported Mrs. Foster.

The first objection which the plaintiff makes is to the resolutions passed at the board meeting of July 30, 1913, appointing Mrs. Foster as chairman in place of the plaintiff, and also appointing her joint managing director with the plaintiff. The objection is, first, that the appointment of the plaintiff as chairman was for so long as he should be a director. The appointment of a director was under article 96, which provides that "Until otherwise determined by extraordinary resolution, the directors for the time being shall continue to hold office subject only to clauses 95 and 97 hereof." Article 95 provides that "The office of director shall be vacated: (*a*) If he become bankrupt, or suspend payment, or compound with his creditors. (*b*) If he be found lunatic or become of unsound mind, or go to reside permanently outside of the United Kingdom. (*c*) If he cease to hold the qualifying number of shares. (*d*) If by notice in writing to the company he vacates his office." Article 97 provides that "The company at any general meeting shall fill up any vacancies in the office of director, and may, by extraordinary resolution, remove any director other than the said George Harvey Foster"—who appears to have been the originator of the company —"before the expiration of his period of office, and appoint another person in his stead." The power of appointing a chairman is under article 102, by which "The directors may elect a chairman of their meetings, and determine the period for which he is to hold office." It is argued that, inasmuch as there has been no express determination of the period for which he is to hold office, it follows that he is to hold office for the whole of the period during which he remains a director. I am unable to accept that argument. When the directors appoint a chairman they appoint him for such time as they think fit, and there is no contract with the person appointed as chairman that he shall remain chairman until he ceases to be a director, but it is open to the directors at any time to substitute another chairman in his place. Therefore I think that argument cannot succeed.

In the same way it is argued that the appointment of the plaintiff as sole managing director was for such time as he should be a director. Here the question depends on article 99, under which

" The directors may, subject to the preceding clauses, from time to time appoint any one or more of their body to be managing director or directors, for such period, at such remuneration, and upon such terms as the directors think fit." In this case, also, it appears to me that the directors have power from time to time to appoint any one or more of their body to be managing director or directors, and it does not involve as a consequence that if they are dissatisfied with the person whom they have appointed managing director, or think that another of their body would fill the position more adequately, they are unable to substitute a new managing director in place of the old one. Then in opposition to both of these resolutions it is said that Mrs. Foster was unable to vote in support of herself as chairman or as joint managing director under article 93, which provides that " A director may contract with the company as vendor, purchaser or otherwise, and may retain the profits of every such contract without liability to account therefor, but a director shall not vote in respect of any contract in which he is interested." In my view, however, the appointment by the directors of one of their body as chairman, or the appointment by the directors of one of their number as a managing director, without more, is not a contract within article 93, but is merely a delegation of their powers, and is very similar to the power which they possess to appoint committees of themselves and delegate their powers to those committees. In my judgment, therefore, the appointments in question of Mrs. Foster as chairman and as joint managing director were not contracts within article 93, and therefore Mrs. Foster was not disabled from voting in support of the resolution.

The next objection taken by the plaintiff is to the resolution passed at the extraordinary general meeting of the company on August 21, 1913, reducing his remuneration as a director from 300*l.* to 25*l.* a year. His contention is that the resolution was invalid on the ground that it was not competent for the company to reduce his remuneration as a director, and in any event that it was not competent for the company to discriminate between the directors with regard to the amount of their remuneration. Then there is an allegation that if the reduction was within the competence of the company the same was effected by the preponderance of the votes of Mrs. Foster and was not made in good faith or in the interests

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of the company or with any regard to the relative values of the services of the plaintiff and Mrs. Foster.

The first contention is that when the plaintiff was appointed a director at a salary of 100*l.*, which was subsequently increased to 300*l.*, he contracted that he would act as director at that salary, and therefore it was not open to the company, so long as he remained a director, to cut down the salary which had been voted to him by the resolution passed at the extraordinary general meeting of the shareholders on January 25, 1911, to which I have already referred, whereby it was resolved that the plaintiff be appointed a director of the company and that his remuneration be at the rate of 100*l.* per annum, and that the directors be paid all their travelling and other expenses properly and necessarily expended by them in and about the business of the company, including their travelling and other expenses incurred in attending the board meetings of the company. This resolution was passed under article 88, which provides that "the remuneration of the directors shall from time to time be fixed by the said George Harvey Foster, during his life and membership in the company; otherwise by the company." There is, therefore, power under the articles to fix the remuneration of the directors from time to time, and in the events that have happened that remuneration is to be fixed by the company. In my view that does not involve that the plaintiff, having been appointed a director, is entitled to the amount which was fixed originally at 100*l.* so long as he remains a director; that is to say, until he is removed by an extraordinary resolution of the company—which, having regard to the way in which the shares in this company are held, is an impossibility—or until one of the events referred to in article 95 occurs. Of course, the contention involves this result, that it would be impossible for the company to alter the terms of the resolution which was passed at the same time as the plaintiff was appointed, under which the travelling and other expenses of the directors are to be borne by the company. This curious result would also happen, that if the plaintiff did absolutely nothing at all as a director, or if he was permanently invalided, as long as he was not found lunatic or of unsound mind, he would be still entitled to the same remuneration as was proposed in the first instance when he was appointed a director. I am unable to accept the argument that, the remunera-

tion of the director having been fixed by the company when he was appointed, he was entitled to insist upon the payment of that remuneration so long as he should remain a director, or that it is now out of the power of the company to reduce the remuneration which is attached to the office of director.

Then the plaintiff in his statement of claim makes the further allegation that it is not within the powers of the company to discriminate between directors. I am unable to follow that argument. The provision is that the remuneration of directors shall from time to time be fixed by the company. I do not find any provision, express or implied, that the remuneration of the directors when fixed by the company must be the same for each director, and, although perhaps that is not a very material circumstance, it is clear it was not the view of the plaintiff himself, who at the early stages of the difficulties which arose between him and Mrs. Foster proposed that Mr. Hardy's remuneration should be reduced from the sum of 100*l.* to the same sum of 25*l.*

Then it was suggested in reply that it was not open to the company to reduce the remuneration of the plaintiff in consequence of the provisions of article 89, which directs that, " Subject to the preceding clauses, the business of the company shall be managed by the directors, who may pay all such expenses of, and preliminary and incidental to, the promotion, formation, establishment, and registration of the company as they think fit, and may exercise all such powers of the company, and do, on behalf of the company, all such acts as may be exercised and done by the company, and as are not by the statutes or by these presents required to be exercised or done by the company in general meeting, or by the said George Harvey Foster, or the manager or managers, subject nevertheless to any regulations of these presents, to the provisions of the statutes, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting." The argument is that by virtue of article 89 the powers of the company under article 88 are exclusively exercisable by the board of directors, with the startling result that, although under article 97 the company is to fill any vacancies in the office of director, the directors themselves are to determine what their remuneration is to be.

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On this point reliance was placed on the case of *Quin & Axtens, Ld.* v. *Salmon* (1), where a somewhat similar clause was considered. In that case there was a question of acquiring and letting premises, and Lord Loreburn L.C. said, dealing with one of the arguments, "In regard to the second point I think it is really too clear for argument that the business in question was business within the meaning of the 75th article." Can the remuneration of directors properly be described as business of the company within the meaning of article 89? In my view it cannot. That article is directed to empowering the directors to carry on the business of the company. I think that the decision what remuneration the directors are to have for their services in carrying on the business of the company is in no sense part of the business of the company within the meaning of that article.

So far I have dealt with the claims of the plaintiff as a person who has been injured in his private as distinct from his representative capacity. But in his statement of claim the plaintiff complains of the resolutions passed at the board meeting of January 19, 1915, when Mrs. Foster and Mr. Myers purported to pass resolutions that the appointment of the plaintiff as managing director of the company be terminated and that Mrs. Foster be appointed sole managing director of the company for a period of ten years at a remuneration. Now, so far as the resolution for the removal of the plaintiff from the position of joint managing director is concerned, the observations that I have already made with reference to the appointment of Mrs. Foster as chairman in his place apply, and in my view there is no ground of complaint. But the latter resolution stands on a different footing. In that case the complaint is that Mrs. Foster and Mr. Myers passed, or purported to pass, a resolution appointing Mrs. Foster managing director at a remuneration. In considering this portion of the case regard must be had to article 100, which provides that two directors shall be a quorum, and that any question at a meeting of directors shall be decided by the number of votes, for or against the resolution, which the directors possess as holders of shares. The complaint is that Mrs. Foster in this case, having 1348 votes, used those votes for the purpose of appointing herself managing director at a

(1) [1909] A. C. 442, 444.

salary, and that, as the appointment of Mrs. Foster was only carried by the use of the votes which she herself possessed, the resolution was not properly carried, inasmuch as under article 93 she was not entitled to vote in respect of the contract. The question, therefore, is whether or not this is a contract within article 93. In the *New British Iron Co. Case* (1) the articles required the directors to possess a share qualification, and provided that the remuneration of the board should be an annual sum of 1000*l.* to be paid out of the funds of the company, and it was held that, although those provisions in the articles were only part of the contract between the shareholders inter se, the provisions were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the company and the directors. It would be a curious thing if a director was prohibited under this article from voting in support of a contract of purchase from himself for a comparatively small sum and yet was enabled to vote in support of a resolution conferring upon himself a remuneration as managing director at a high salary. In my judgment, if a resolution is passed at a directors' meeting that one of the directors be appointed a managing director at a remuneration and that director is present and accepts the appointment, there is a contract between the company and the director, and the director is not under article 93 able to vote in support of such a contract. That, however, does not determine this portion of the case. This is a matter in respect of which the plaintiff is suing for a wrong that he alleges has been done to the company, and he is suing on behalf of, as he says, the rest of the shareholders of the company, other than Mrs. Foster, though admittedly in fact he is suing on behalf of the minority of the shareholders. The question, therefore, is whether he is able to sue in such a case, or whether it is a case in which the matter must be dealt with by a general meeting of the company. The general principles which govern these cases were laid down in *Burland* v. *Earle* (2), where Lord Davey delivered the judgment of the Privy Council and stated the law in a passage which is very well known: "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no

(1) [1898] 1 Ch. 324. (2) [1902] A. C. 83, 93.

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jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* (1) and *Mozley* v. *Alston* (2), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule" —that is to say, that the company ought to bring the action— " where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works*. (3) It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall* v. *Gardiner*." (4) That passage was approved in *Dominion Cotton Mills Co.* v. *Amyot* (5) and applied by Kekewich J. in *Normandy* v. *Ind, Coope & Co.* (6) It is manifest that this is not a case which

(1) 2 Hare, 461.
(2) 1 Ph. 790.
(3) L. R. 9 Ch. 350.
(4) 1 Ch. D. 13, 25.
(5) [1912] A. C. 546.
(6) [1908] 1 Ch. 84.

is ultra vires the company. It is obvious that it is not beyond the powers of the company, as defined by its memorandum of association, to appoint a managing director and to vote him a remuneration. Is it of a fraudulent character? Cases like *Menier* v. *Hooper's Telegraph Works* (1) are cases where the majority have been engaged in appropriating to themselves that which ought to be shared between themselves and the minority, but I am not aware of any case in which it has been suggested that, if the majority think that one of themselves is the best person to be managing director and proceed to appoint that person managing director at a remuneration, they appropriate to themselves the assets of the company within the meaning of Lord Davey's observations. The company is in such a case obtaining the services for which it is paying, thus getting a quid pro quo, and there is, I think, no foundation for the suggestion that in such a case there is an appropriation of property in which the minority are interested for the benefit of the majority. I do not think such a case comes within the scope of the observations of Lord Davey in *Burland* v. *Earle*. (2)

In this case it is to be observed that there is no evidence of any kind that the remuneration which has been voted by the board of directors, or purported to be voted by the board of directors, is excessive or grossly unfair. I have merely the resolutions as recorded in the minutes, and from them I am unable to infer that the services which Mrs. Foster was to render as managing director were not properly remunerated by the sum which it was proposed that she should receive.

Before I come to consider one other point of law there is one matter with which I should like to deal, and that is the general meeting of the company which was held on August 5, 1915, for the purpose of confirming the resolution which had been passed by the directors in January, 1915. [His Lordship then examined in detail the evidence of the two witnesses, one called by the plaintiff and the other by the defendants, with regard to what took place at this meeting, and continued:] There is a direct conflict of testimony in this case between these two gentlemen, who were the only two witnesses called to give evidence on this point. In these circum-

(1) L. R. 9 Ch. 350. (2) [1902] A. C. 83.

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stances I am unable to come to the conclusion that it has been proved that those resolutions were passed at that meeting. For myself I am unable to see that it is very relevant whether the resolutions were passed or not. If the plaintiff is right in the argument adduced on his behalf, the result would be that in any case the resolution, if passed at the meeting, was bad, because, according to that argument, the company had no power to pass any such resolution. If, on the other hand, he is wrong in the argument, the company has power to deal with the matter at a general meeting; there is admittedly a majority opposed to the plaintiff in this matter, and therefore the result would be that the matter would have to go to the general meeting, and the plaintiff could not on behalf of the company complain of the transaction of January, 1915, before this Court. But it is said that the company in general meeting is not capable of dealing with the question having regard to article 99—that is the article under which the directors may, subject to the preceding clauses, from time to time appoint any one or more of their body to be managing director or directors, for such period, at such remuneration, and upon such terms as the directors think fit. Reliance was placed upon *Thomas Logan, Ld.* v. *Davis* (1), where article 99 of a limited company gave the directors power to appoint one of their body to be managing director, and article 113 provided that the business of the company was to be managed by the directors, in terms somewhat similar to the present case. At an extraordinary general meeting of the company a resolution was passed that L., who was then the managing director, should be reappointed sole managing director. The directors nevertheless appointed S., another member of their body, sole managing director. It was held that the provisions of article 113 making the powers of the directors subject to the regulations of the company related to the general management of the affairs of the company, and not to the appointment of a managing director or other matters specially placed under the control of the directors by the articles, and that therefore the appointment by the board of directors of S. as sole managing director was valid. I am not satisfied that in the circumstances of this case article 99 can be relied upon. It appears to me that the resolution in January, 1915, was in fact an irregularity. If a director votes in respect of a contract of sale and

(1) 104 L. T. 914.

there is a provision similar to article 93, the resolution is, no doubt, open to objection; but I take it that the company in general meeting in such a case could waive the objection and confirm the resolution which, owing to the irregularity, was open to objection. In other words, the company in such a case in general meeting may waive the objection which it is entitled to take under article 93. Now, if that be the true view, as I think it is, and this was an irregularity, the result is that the company is capable of dealing with the matter in general meeting, and therefore the plaintiff, as representing the minority, is not able to sue in respect of it in this Court. Moreover, there is this further consideration to be observed. Here I think it must be taken on the facts that all parties agreed that a managing director ought to be appointed; there is a contest between the plaintiff and Mrs. Foster, the two persons who hold the largest blocks of shares, as to which of them should occupy that position. They were apparently the only persons whom any shareholder contemplated as possible managing directors of the company. First one was appointed, then the two were jointly appointed, and then Mrs. Foster insisted on the appointment of herself, and that was objected to by the plaintiff. Owing to the way in which the shareholding of the directors is distributed neither of them can be appointed. The plaintiff holds a minority of the votes on the board; Mrs. Foster is in the position that she is unable to vote in support of her own appointment. From a business point of view it seems to me that there are only two persons who are possible managing directors, and the board has been reduced to the position that it is unable, owing to internal friction and faction, to appoint anybody as a managing director. In those circumstances I should apply the decision of Warrington J. in *Barron* v. *Potter*. (1) The learned judge says: "If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling"—in this case unable—"to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment. The company

(1) [1914] 1 Ch. 895, 903.

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has passed a resolution for that purpose, and though a poll has been demanded no date or place has yet been fixed for taking it. The result therefore is that I must grant" the relief asked.

The result is that this question relating to the appointment of Mrs. Foster as managing director is one with which the general meeting of the company can deal, and recourse must be had to a general meeting; and therefore, having regard to the authorities, I think that this part of the plaintiff's case also fails.

Solicitors: *Guscotte, Wadham, Tickell & Co., for Goodwin & Cockerton, Bakewell; Ridsdale & Son, for Nicholson & Co., Wath-upon-Dearne.*

R. M.

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In re BERNARD'S SETTLEMENT. BERNARD *v.* JONES.

[1915 B. 3633.]

Settlement—Testamentary Power of Appointment—Appointment by Will—Revocation and New Appointment by Codicil upon Invalid Trusts—Original Appointment operative.

A testatrix had under her marriage settlement a testamentary power to appoint the settled funds to all or any of her three sons and six daughters, all of whom attained the age of twenty-one years. By her will she appointed the funds to her six daughters in equal shares absolutely. By a codicil to her will, after reciting the appointment to her daughters and her desire that the share of her daughter M. should not be paid to her but should be held upon the trusts for her benefit thereinafter declared, the testatrix revoked the said appointment "in so far (but no farther) as the same" gave to M. an absolute interest therein, and appointed the share which M. "would have been entitled to but for these presents" to trustees upon absolute discretionary trusts for her for life, with a gift over after her death to her sisters, which trusts offended the rule against perpetuities and were void:—

Held, that the share appointed to M. by the will was not wholly revoked by the codicil and did not, on failure of the trusts of the codicil, go as in default of appointment under the settlement; but that, the trusts of the codicil being void, the original appointment to M. by the will remained operative.

ADJOURNED SUMMONS.

By an indenture dated March 2, 1844 (being the settlement executed upon the marriage of Henry and Mary Bernard), certain stocks,

funds, and securities were assigned to trustees upon trusts for the benefit of Henry and Mary Bernard during their respective lives and the life of the survivor of them, and after the decease of such survivor upon trust for all or such one or more exclusively of the others or other of the issue of the said marriage " in such parts shares and proportions if more than one and for such interest and interests and with such restrictions and provisions and generally in such manner and form in all respects for the benefit " of the said issue as Henry and Mary Bernard should by any deed, with or without power of revocation, jointly appoint, and in default of such appointment then as the survivor of them should by any deed or will or any codicil appoint, and in default of and subject to any such joint or sole appointment in trust for all the children of the said marriage in equal shares to be vested interests at twenty-one or marriage respectively. The settlement contained the usual hotchpot clause.

By a deed poll dated September 14, 1872, Henry and Mary Bernard, in exercise of the power reserved to them by the settlement, appointed that from and after the decease of the survivor of them the trustees of the settlement should stand possessed of the trust premises upon trust for the children of their said marriage in such shares and proportions as that the share of each of such children being a daughter should exceed the share of each of such children being a son by the sum of 500*l*. The deed poll contained a power for Henry and Mary Bernard or the survivor of them by any instrument in writing to revoke the appointment thereby made, and by the same or any other instrument in writing to make such other appointment as they or the survivor of them might think fit.

Henry Bernard died in October, 1875.

By her will dated February 3, 1877, Mary Bernard, after appointing J. Coleman and C. Garrod to be the trustees and executors thereof, and after reciting the deed poll of September 14, 1872, and that she was desirous of partially revoking the same, she, in exercise of the power contained in the deed poll and of all other powers enabling her, revoked the deed poll and the appointment thereby made so far as the same related to any shares or interests by the said deed poll appointed to or in favour of all, every, or any of her sons, and in further exercise of the further power for that purpose contained in the said settlement and of every other power enabling her,

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did by that her will appoint that after her decease the trustees of the settlement should stand possessed of the moneys subject to the trusts thereof upon trust for all her daughters in equal shares and proportions, and further appointed that the portion or share of each of her said daughters should vest at the respective times mentioned in and provided by the settlement; and the testatrix, after making divers pecuniary bequests, gave the residue of her estate to her trustees upon trust, after payment of her debts, funeral and testamentary expenses, and legacies, for her four then unmarried daughters, of whom the plaintiff was one.

By a codicil dated April 12, 1886, the testatrix appointed the defendant Richard Harris to be a trustee and executor of her said will in the place of C. Garrod, who had died since the date of the will.

In 1892 the testatrix made a second codicil to her will which is not material.

On April 28, 1898, the testatrix made a third codicil to her will, and thereby, after reciting that she had by her will in exercise of the power conferred by the settlement appointed that the funds comprised therein should be held upon trust for all her daughters in equal shares, and that she had bequeathed in trust for her daughter Margaret Bernard (the plaintiff) legacies of 100*l.* and 1100*l.* and a share of her residuary estate, continued as follows:

"And whereas I am desirous that the share of my said daughter Margaret Bernard of and in the said settled funds and the said legacies and share of my residuary property or the income thereof shall not be paid or transferred to her but be held upon the trusts for her benefit hereinafter declared concerning the same respectively.

"Now therefore in pursuance and exercise of the power and authority for this purpose contained in my said marriage settlement and of every other power or authority in any wise enabling me in this behalf I do by this instrument in writing revoke the said appointment of the said settled funds in so far (but no farther) as the same appoints or gives to my said daughter Margaret Bernard an absolute interest therein or in some part or parts thereof.

"And in further exercise and execution of the power or authority contained in the said settlement and of every other power or authority in any wise enabling me in this behalf I do by this same instrument in writing (being a codicil to my last will) declare and appoint that the

share or shares original and accruing of and in the said settled funds which my said daughter Margaret Bernard would have been entitled to but for these presents shall be paid or transferred by the trustees or trustee for the time being of the said settlement to the trustees or trustee of my said will (hereinafter called my general trustees) by whom the same shall be held upon the trusts for the benefit of my said daughter Margaret Bernard hereinafter declared.

"And I revoke the trusts declared by my said will in respect of the said legacy of 1100*l.* and I also revoke any and all directions contained in or to be applied by my said will for payment of the said legacy of 100*l.* and share of my residuary property or the income thereof to my said daughter And I declare and direct that the said legacy of 1100*l.* and also the said legacy of 100*l.* and share of any residuary property given to my said daughter Margaret Bernard by my said will shall be held by my general trustees upon the trusts hereinafter declared

"And I hereby declare that my general trustees shall stand possessed of the said share or shares of the said settled funds and of the said legacies of 1100*l.* and 100*l.* and share of my residuary property hereinbefore directed to be paid or transferred to or held by them upon trust as to the said legacy of 100*l.* to pay the same to my special trustees hereinafter named as soon as possible after my decease and as to the said share or shares of the said settled funds and the said legacy of 1100*l.* and the share of my residuary property upon trust during the life of my said daughter Margaret Bernard to pay the income thereof to or permit the same to be received by my special trustees hereinafter named whom I hereby direct to apply such income and the said legacy of 100*l.* or some part or parts thereof respectively at such time or times in such manner and form for the maintenance support and benefit of my said daughter Margaret as my special trustees shall in their absolute and uncontrolled discretion think proper but so that no part or parts of the said monies shall be paid directly or indirectly to or otherwise so as to be under the control or disposition of my said daughter and subject to the foregoing trust my general and special trustees respectively shall hold the said trust property and the income thereof not required or applied for the purposes aforesaid upon trust for all my other daughters living at the decease of my said daughter Margaret

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Bernard in equal shares"; and the testatrix thereby appointed her married daughter the defendant Edith Jones and the defendant Richard Harris and W. Cornish to be the special trustees therein-before referred to.

In July, 1907, the testatrix made a fourth codicil to her said will whereby she appointed her daughter the defendant Frances Bernard to be an additional special trustee for the purposes mentioned in the third codicil.

The testatrix died in November, 1907, and her said will and codicils were duly proved by J. Coleman and the defendant R. Harris. J. Coleman died in 1913. W. Cornish, named in the third codicil, declined to act as a special trustee.

There were nine children of the marriage, namely, three sons and six daughters, all of whom attained the age of twenty-one years. The eldest son, George Bernard, died in Queensland in 1909, intestate. The second son, Henry Bernard, died in Canada in 1914, and the defendant Richard Harris was his legal personal representative in England. The third son, Edward Bernard, was living in New South Wales.

The trustees of the marriage settlement distributed the settled funds amongst the persons entitled thereto shortly after the death of the testatrix, except the share appointed to the plaintiff by the will and dealt with by the third codicil. This share they paid over to the defendant Richard Harris as the surviving trustee of the testatrix's will and codicils, and he and the special trustees appointed by the third codicil held and applied it upon the trusts declared thereof by the third codicil. The value of the share was about 2700*l.* Questions ultimately arose as to the validity of the trusts of the third codicil, and the plaintiff issued an originating summons to determine (1.) whether or no the appointment by the third codicil of her share upon discretionary trusts of the income thereof was void as infringing the rule against perpetuities; (2.) whether or no the appointment by the third codicil of the same share and the unapplied income thereof after her death to her sisters was void as infringing the rule against perpetuities; and (3.) whether or no, upon the true construction of the will and codicils, she was entitled absolutely to her original share of the settled funds referred to in the third codicil.

Jenkins, *K.C.*, and *Dighton Pollock*, for the plaintiff. The first question is whether the trusts declared in the third codicil concerning the plaintiff's share infringe the rule against perpetuities.

Austen-Cartmell, for two of the plaintiff's sisters. I must admit on the authorities that the trusts of the plaintiff's share in the third codicil offend against the rule of perpetuities and are void. If the share goes as in default of appointment under the settlement the sons will benefit, because the daughters will have to bring their appointed shares into hotchpot.

Jenkins, *K.C.* Then the question is whether the plaintiff's share belongs to her absolutely under the appointment in the will which the third codicil purports to revoke, or whether it devolves as in default of appointment under the settlement. It is submitted that this is a case of dependent relative revocation, that is to say, that the testatrix only revoked the appointment made by the will to the plaintiff in order to settle the share in the way provided by the codicil, and did not intend to revoke except for that purpose. The contention is that the original appointment by the will is not affected by the subsequent invalid codicil: *Onions* v. *Tyrer*. (1) In *Tupper* v. *Tupper* (2) and *Quinn* v. *Butler* (3) the revocation remained in force although the gift by the codicil was void, but I rely on the principle of *Quinn* v. *Butler*. (3) It is a question of intention. In *Duguid* v. *Fraser* (4) there was an implied revocation by codicil which was invalid, and the original gift remained, but Kay J. seems to have relied to some extent on the fact that there was no express revocation. The reasonable view is to consider the intention of the testatrix. If the intention is to revoke in any case, then the original gift is gone, but if the revocation is only for a particular purpose that fails, then the original gift remains. Here the language of the codicil shows that the testatrix still contemplates that it is the plaintiff's share and that it is to be settled. She revokes the appointment "in so far (but no farther) as" the appointment gives the plaintiff an absolute interest. The primary object is to cut down the plaintiff's absolute interest and to fetter her control over her share. This is really a case of an incomplete settlement, which is void, fastened on a previous

(1) (1716) 1 P. Wms. 343.
(2) (1855) 1 K. & J. 665.
(3) (1868) L. R. 6 Eq. 225, 227.
(4) (1886) 31 Ch. D. 449, 452, 453.

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absolute gift, which remains, notwithstanding the presence of the words " I revoke."

Draper, for the general and special trustees of the will and codicil who took no part in the argument, and also for the defendant Richard Harris as the legal personal representative of the deceased son Henry Bernard. Accepting the view that it is a question of intention, I rely on *Quinn* v. *Butler*. (1) There is here, on the language of the codicil, a clear absolute revocation of the gift of the share to the plaintiff. She is to have no absolute interest in or control over the whole or any part thereof or the income. It does not depend on the word " revoke," but on the clear unequivocal intention of the testatrix: The share which the plaintiff " would have been entitled to but for these presents " is taken away from her and settled on discretionary trusts so that the plaintiff cannot touch it, and it is given over on her death to her sisters. Those trusts having failed, the share goes as in default of appointment under the settlement.

NEVILLE J. In this case under a marriage settlement, and in the events that happened, the wife had a power of appointment by will over the settled funds in favour of her children and issue, and by her will she exercised that power by appointing the funds to her six daughters equally. That, of course, was a perfectly good appointment within the terms of the power in the settlement. By the third codicil to her will she dealt with the share of one of her daughters, the plaintiff, in a way which there is no doubt infringed the rule against perpetuities. She had to vest the share in some person absolutely before the expiration of twenty-one years after her own death, and the provisions which she made by the codicil in favour of her daughter were such as offended against the rule, and were consequently invalid. The important question arises whether under those circumstances the invalidity of the appointment in the codicil destroys the appointment that had been made in favour of the plaintiff by the will, or whether under the circumstances, having regard to the intention of the testatrix and her attempted exercise of the power in the codicil failing, the valid earlier exercise of the power by the will is operative. There is a good deal of authority on the point, and the first case to which I wish to refer is *Onions*

(1) L. R. 6 Eq. 225, 228.

v. *Tyrer*. (1) What was decided there was shortly this: A will having been executed so as to pass real estate, and having been subsequently revoked by another will executed so as to be a good revocation but not so as pass real estate, it was held that the previous devise of the real estate was good and that the revocation was not complete. That case has been considered in subsequent cases. The next case in which a similar point arises is *Tupper* v. *Tupper*. (2) In that case certain legacies were given by the testator to certain charities out of his personalty. By a codicil those gifts were revoked, and a gift was made to another charity which was incapable of operation because the money so bequeathed was to be laid out in land and the provisions of the Statute of Mortmain were fatal to the gift. It was then considered whether the gifts to the original charities were untouched by the later gift, or whether as a matter of fact the revocation was conclusive against them so that they took nothing under the will and codicil. It was held, and, if I may say so with respect, inevitably, that the first charities could not take because the testator had taken away from them what he had given them, and there was nothing in his bequest to another charity to show that he intended, if the other charity could not take, that the first charities should have their legacies. I do not think *Tupper* v. *Tupper* (2) presents any difficulties. Then there comes the case of *Quinn* v. *Butler* (3), in which *Onions* v. *Tyrer* (1) is considered by Lord Romilly. In that case a revocation of an appointment of a certain sum was followed by an appointment of the whole fund to one of the objects of the power, and that appointment was invalid because the power was not an exclusive power. But I think what Lord Romilly says on the principles which apply to cases of this kind is very instructive. He says this: "I think the whole question depends upon the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer* (1) applies. The case has generally arisen where there has been a defective execution of the second instrument." It seems to me that the view there stated by Lord Romilly is a perfectly accurate definition of the principle which ought to guide the Court

(1) 1 P. Wms. 343. (2) 1 K. & J. 665.
(3) L. R. 6 Eq. 225, 227.

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in coming to a conclusion upon a point of this nature. One other authority to which I must refer is the case of *Duguid* v. *Fraser* (1), a decision of Kay J., in which he held that the subsequent gift, in the events that had happened, having failed, the original gift by the appointor was not revoked. The only reason why I refer to the case is that the learned judge in his judgment refers to previously decided cases in these terms : " There have been cases where the intention to revoke in any event being clear, as where the appointor began the invalid appointment by saying ' I revoke the former appointment to this extent,' and then proceeded to appoint —in which the Courts have been compelled by the language to give effect to the revocation, though not to the subsequent appointment. I do not feel myself fettered by anything of that kind." In that case there were no direct words of revocation of the previous gift. Now it was a good distinction no doubt in a sense between the case before him and the cases that had been cited, and I respectfully agree with the conclusion that he came to in the case before him, but I think the words I have quoted might lead to a misunderstanding, because it does not seem to me that the real point is determined by the question of whether there are words of direct revocation or whether such words are absent. I think it is far too narrow a view to apply any such rule in construing documents of this kind, because it seems to me that when you have a gift in lieu of a previous appointment, either by necessary implication or by direct words, you must revoke the original appointment if you are to give effect to the second ; and therefore, whether the testator says in so many words " I do revoke," or whether he uses words which necessarily involve revocation, it seems to me the result is the same, and that it would not be a wise distinction to make, except so far as the use of the direct words may be some guide as to the intention of the testator. I think the question which the Court has to determine is, Did the testator intend by the second appointment to revoke in any case the prior appointment, or did he really only intend to revoke it for the purpose of carrying out the alteration made in his second appointment and without having any intention of revoking the previous gift except for the purpose of the altered appointment? Turning to the case before me, I think the intention of the appointor is reason-

(1) 31 Ch. D. 449, 452.

ably clear. The testatrix is dealing with a provision she has made for her daughter. In the first instance she has given her an equal share with her other daughters in the funds to be appointed. But then she desires to control the provision she has made for her daughter, and I think the recital in the codicil itself indicates the purpose for which the revocation of the previous absolute gift to the daughter was made. She says "Whereas I am desirous that the share of my said daughter Margaret Bernard of and in the said settled funds and the said legacies and share of my residuary property or the income thereof shall not be paid or transferred to her but be held upon the trusts for her benefit hereinafter declared concerning the same respectively." Now, is not that a clear expression of her intention? She says, in effect, "I am not intending to deprive my daughter altogether of what I have given her, but what I am seeking to do is to ensure that it shall be properly applied for her maintenance." It seems to me that obviously the intention of the testatrix is only to revoke the previous appointment for the purpose of giving effect to the increased security which she thought her daughter would have by the protecting clauses that she has added in the codicil. There is only one thing which does no doubt militate against that view, and that is the gift over upon the death of the daughter. But I do not think that is strong enough to enable me to come to the conclusion that the testatrix intended to revoke her bounty under her previous appointment in all respects and not only for the purpose of giving effect to the substituted provisions in the codicil. I hold, therefore, applying the rule which Lord Romilly lays down, that in this case, the appointment by the third codicil having failed, the original appointment made by the will remains operative.

Solicitors: *Mead & Co., for Harris & Harris, Wells; Collyer-Bristow & Co.*

H. L. F.

NEVILLE J.

1916

March 30; *April* 5.

In re MELLISH.
DAY *v.* WITHERS.

[1915 M. 2924.]

Will—Construction—Life Interest—Gift in Reversion to Next of Kin—Class, when to be ascertained—Artificial Class.

A testator who died in 1880 by his will gave 1200*l.* out of his residuary estate upon trust to invest and to pay the income to G. M. for life, and after his decease to pay the income to E. M., the wife of G. M., for life, and after the decease of the survivor of them upon trust for the person or persons who at the decease of such survivor should be of the blood of G. M. and of kin to him and who would under the Statutes of Distribution of Intestates Effects be entitled to his personal estate as if he were dead unmarried and intestate. G. M. died in 1882, and E. M. died in 1915:—

Held, that the gift was to an artificial class consisting of the next of kin of G. M. to be ascertained as if he had died on the day of the death of E. M.

ADJOURNED SUMMONS.

James Mellish by his will dated March 10, 1880, after appointing two persons the trustees and executors thereof, and after bequeathing certain pecuniary legacies, bequeathed the residue of his real and personal estate to his trustees upon trust for sale and conversion and for payment of his debts, funeral and testamentary expenses, and legacies thereinbefore bequeathed, and directed his trustees out of the residue of the proceeds of such sale and conversion as aforesaid to invest the sum of 1200*l.* and to pay the annual income of the same to his son George Mellish during his life, and after his decease to pay the same income to Emma Mellish, the wife of George Mellish, during her life; and the will proceeded: "And from and immediately after the death of the survivor of them upon trust for the person or persons who at the decease of such survivor as aforesaid shall be of the blood of my said son George Mellish and of kin to him and who under the Statutes of Distribution of Intestates Effects would be entitled to his personal estate if he were dead unmarried and intestate such persons if more than one to take in the portions prescribed by the same statutes."

James Mellish died on March 23, 1880.

George Mellish died in June, 1882, leaving his wife, Emma Mellish,

him surviving. His statutory next of kin at his death were his brothers James Mellish the younger and Albert Mellish, his sisters Anne Quickenden, Anna Smith, and Louisa Withers, and his nephew George Hall, the only child of his deceased sister Mary Hall.

James Mellish the younger died in 1883 leaving two children only, namely, Annie Day and Harriette Flint, the latter of whom died in 1892.

Anne Quickenden died without issue in June, 1891, and Anna Smith died without issue in January, 1892.

Albert Mellish died in December, 1911, leaving issue two children only, namely, Sara Mellish and James Hugh Mellish.

Emma Mellish died on September 30, 1915. The question then arose as to who were the persons entitled to the trust legacy of 1200*l.*, and the present trustee of the testator's will took out a summons to determine the matter. Of the statutory next of kin of George Mellish there were living at the death of Emma Mellish only the defendants Louisa Withers and George Hall. But if the next of kin of George Mellish ought to be ascertained as if he had died on the day of the death of Emma Mellish, the persons entitled as his next of kin would, in addition to the defendants Louisa Withers and George Hall, be the defendants Annie Day, Sara Mellish, and James Hugh Mellish.

Greenland, for the plaintiff.

Bovill, for the defendants Louisa Withers and James Hall. This is a gift to a class, the next of kin of George Mellish, who are to be ascertained at the date of his death, but only such of them as survive Emma Mellish are to take the fund: *Spink* v. *Lewis* (1); *Bullock* v. *Downes* (2); *In re Nash* (3); *In re Winn* (4); Hawkins on Wills, 2nd ed. p. 131.

Bompas, for the defendants Annie Day and Sara Mellish. This is a gift to an artificial class consisting of the next of kin of George Mellish to be ascertained at the death of Emma Mellish as though George Mellish had died at the date of her death: *Mortimer* v. *Slater* (5); *In re Sturge and Great Western Ry. Co.* (6); *In re*

(1) (1791) 3 Bro. C. C. 355.
(2) (1860) 9 H. L. C. 1.
(3) (1894) 71 L. T. 5.
(4) [1910] 1 Ch. 278, 286, 289.
(5) (1877) 7 Ch. D. 322.
(6) (1881) 19 Ch. D. 444.

NEVILLE J. 1916 MELLISH, *In re.* DAY *v.* WITHERS.

McFee. (1) It is a question of intention and depends on the particular words of the gift in each case.

Baden Fuller, for the defendant James Hugh Mellish. The gift is to a class consisting of the next of kin of George Mellish to be ascertained once for all at the date of his death: *Bullock* v. *Downes.* (2) I rely on the words "if he were dead unmarried and intestate." The principle is that there must be a clear indication if another class is intended: *Fletcher* v. *Fletcher* (3); *Wheeler* v. *Addams* (4); *In re Wilson* (5); *Mortimore* v. *Mortimore* (6); *Wharton* v. *Barker.* (7) The authorities are collected in Hawkins on Wills, 2nd ed. pp. 133—134.

Cur. adv. vult.

April 5. NEVILLE J. If an ultimate gift after the failure of other limitations is in any form equivalent to this, "to my next of kin according to the statute as though I had died intestate and unmarried," it appears to me fairly obvious that the testator intends to designate those who were next of kin at his death, and this is in accordance with the rule laid down in *Bullock* v. *Downes.* (2) Even in this case it is to be observed that the gift does not take effect by operation of the statutes, which can only apply if the testator did die intestate. Some of the reasoning in the reported cases based on the necessity of bringing yourself within the statutes seem to me overstrained. In any hypothetical intestacy the gift is merely referential. On the other hand it appears to me that if the testator says in effect "to those who at the date of the event upon the happening of which the gift over takes effect or at any other future date are my next of kin as if I had then died intestate and unmarried," he is indicating what has been called an artificial class to be ascertained at the date of the happening of the event. The rule in *Bullock* v. *Downes* (2) is expressly stated to be prima facie, and I do not think it precludes the Court from giving effect to what it finds to be the intention of the testator expressed by the words of the will. It appears to me also that where the testator, as in this case, resorts to

(1) (1910) 79 L. J. (Ch.) 676; 103 L. T. 210.
(2) 9 H. L. C. 1, 18.
(3) (1861) 3 D. F. & J. 775.
(4) (1853) 17 Beav. 417.
(5) [1907] 2 Ch. 572.
(6) (1879) 4 App. Cas. 448.
(7) (1858) 4 K. & J. 483.

elaborate explanation with regard to what he intends, it is probably with a view to expressing something different from what would result from a bare reference to his next of kin according to the statutes, and if what he does mean is reasonably plain there is nothing in *Bullock* v. *Downes* (1) to prevent effect being given to it.

The testator in the will which I have to construe gave a sum of 1200*l.* out of his residue to trustees upon trust to invest and to pay the income to his son George Mellish for life, and after his death to his wife for life, and after the death of the survivor of them upon trust for " the person or persons who at the decease of such survivor as aforesaid shall be of the blood of my said son George Mellish and of kin to him and who under the Statutes of Distribution of Intestates Effects would be entitled to his personal estate if he were dead unmarried and intestate such persons if more than one to take in the proportions prescribed by the same statutes." Three constructions of these words have been suggested—(1.) that the class of next of kin is to be ascertained once for all at the death of George Mellish; (2.) that the class is to be ascertained at the death of George Mellish, but those only take who are living " at the decease of such survivor "; and (3.) that the class is a so-called artificial class to be ascertained " at the decease of such survivor." I think the meaning of these words is reasonably plain. The testator appears to me to be referring to a class of persons living at the death of George Mellish composed of persons who not only fulfil the condition " of the blood of George Mellish and of kin to him," but also that of being persons who would take under the statutes upon the death of George Mellish unmarried and intestate at the date when the gift takes effect, and the testator adds that the persons fulfilling these conditions (should there be more than one) are to take in the proportions prescribed by the same statutes. I think the context here requires the words " if he were dead " to be interpreted " if he had then died." The words used in *Bullock* v. *Downes* (1) were as follows: " such persons of the blood or next of kin to me as would by virtue of the statutes have become and been then entitled thereto in case I had died intestate." The only words there which it seems to me could possibly take the case out of the prima facie rule are the words " and been then

(1) 9 H. L. C. 1.

NEVILLE J. entitled," and, having regard to the context, these words appear to me to refer rather to the survivors of a class than to any limitation of the class itself which had been previously determined. They were not deemed adequate, however, to limit the gift to the survivors of the original class. I have been referred to a decision of Hall V.-C. in *In re Sturge and Great Western Ry. Co.* (1), followed by Joyce J. in *In re McFee* (2), and to a later decision of Eve J. in *In re Helsby* (3), and I am unable to distinguish any one of these cases from the case before me in any sense favourable to the application of the rule in *Bullock* v. *Downes*. (4) The words of the will in the last case were " such one or more of the persons who at the time of my daughter's decease shall be my next of kin according to the Statutes for the Distribution of Intestates Effects," and it was held that an artificial class to be ascertained at the daughter's death was intended. These cases are binding upon me and I must follow them. They are in accordance with the view which I should myself take of the construction of the present will. I must declare that the class is to be ascertained at the date of the death of George Mellish as if he had died at the date of the death of Emma Mellish.

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Solicitors for all parties : *Loughborough, Gedge & Co., for Pearless, Sons & De Rougemont, East Grinstead.*

(1) 19 Ch. D. 444.
(2) 79 L. J. (Ch.) 676.
(3) (1914) 84 L. J. (Ch.) 682.
(4) 9 H. L. C. 1.

H. L. F.

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Feb. 24, 25.

In re TOD.

BRADSHAW *v.* TURNER.

[1915 T. 1372.]

Will—Construction—Shares of Residue—Period of Distribution—Hotch-pot—Advanced and Unadvanced Shares.

The testator by his will made in 1892 appointed his wife and his sons J. and A. executors and trustees, and after certain legacies, including a trust legacy to his trustees, he made a general devise and bequest to his said trustees upon trust to sell and convert as and when they should think expedient, and provided that the income of his estate should be treated like the income of the investments which would arise from the proceeds of sale until conversion. Then he provided for four sums of 6000*l.* for each of his daughters, and for the settlement of the legacy of the daughter who was then unmarried, the other three sums being given to the trustees of the married daughters' settlements. And he declared that the will was made on the assumption that the residuary real and personal estate disposed of thereby (including the money to the income of which his wife was entitled under the trusts of the settlement executed on their marriage and the sums of 5000*l.* and 2300*l.* or thereabouts which he had paid on account of his son J., which sums were to be deducted from the share of his residuary estate thereinafter given in trust for the benefit of the son's wife and family), after payment thereout of his debts, funeral and testamentary expenses, and the legacies thereby given, other than legacies to his wife or any of his children, would amount to upwards of 60,000*l.*, and gave directions in case that assumption was not realized. Then the trustees were to stand possessed of the residue of his residuary estate after payment of the money before mentioned, "as to one half on trust to pay, transfer, or invest the same in the names of his wife and his son A. to be held upon trust to pay the annual income to M., the wife of J., for life for her separate use, and without power of anticipation," and after her decease upon trusts for their family. Then testator directed the general trustees of the will (who were different persons from the trustees of J.'s share) to hold the other moiety of the residue upon trusts in favour of A. and his wife and family. By another material clause (although it did not actually take effect) testator provided that if he should at any time thereafter give to any son or daughter any sum exceeding 1000*l.* at any one time, any sum so advanced should be considered as a payment by him on account of the sums thereinbefore bequeathed to or in trust for him or her, or his or her children, and that the amount so given (with interest from the date of the advance) should be brought into account and deducted from the sum thereinbefore

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bequeathed to him or her. The testator died in 1893 leaving his widow and several children of their marriage.

A large part of the estate was not realized, and a number of investments were, down to 1910, appropriated to the two sons' settled shares, the appropriations to A.'s share exceeding those to J.'s share, the amount to be accounted for by the latter being thus reduced to 4000*l.* The income of the unappropriated estate was for a time applied on the principle of *In re Hargreaves* (1903) 88 L. T. 100, and afterwards on the principle of *In re Poyser* [1908] 1 Ch. 828 :—

Held, that the latter principle ought to have been acted on throughout, and that the apportionment of capital as between the two shares should be made on a corresponding principle.

The rule laid down in *In re Rees* (1881) 17 Ch. D. 701 still prevails.

ALEXANDER TOD, of Walmer in the county of Kent, by his will, dated January 18, 1892, appointed his wife, Louisa Tod, and his sons John Henry Tod and Alexander Maxwell Tod executors and trustees thereof, and after giving two pecuniary legacies he gave to his wife (who was sufficiently provided for by settlements) the use of his house at Walmer called " Walmer Lodge " rent free for a year from his death, and on her ceasing to occupy the same he directed that it should form part of his residuary estate. The only other testamentary provision for his wife was that she was to have the use of certain plate and other articles during her life. After some other dispositions of specified properties, (1.) *the testator devised and bequeathed his residuary real and personal estate to the trustees of the will, " Upon trust at such time or times after my decease as they shall judge expedient to sell the same " [in manner pointed out]*. And he directed that " the yearly produce, until conversion of my real and personal estate, shall, as *from the day of my decease, be considered as the income thereof for the purpose of the trusts and provisions of this my will, and be applied accordingly.*" Then followed a direction that the trustees should hold the money of which the testator died possessed and which should arise from the sales aforesaid (after payment of his debts, funeral and testamentary expenses, and pecuniary legacies) as to each of three sums of 6000*l.* upon trust for each of his married daughters, Anna G. Ogilvie, Eleanor M. Paxton, and Alice E. Christian. These sums he directed to be paid to the trustees for the time being of the same three daughters' marriage settlements, to be held by them respectively upon the trusts (subject to a slight variation) of the marriage

settlements. Another sum of 6000*l.* was directed to be held by the will trustees in favour of the testator's unmarried daughter Emily J. L. Tod during her life, and afterwards for her children and issue, and in case of the death of any such four daughters and the failure of her issue attaining a vested interest in the moneys so given, the testator directed that such moneys should be divided between J. H. Tod, A. M. Tod, and such of the testator's said daughters as should be then living (or should, whether sons or daughters, have died leaving issue who should have attained or might live to attain vested interests in the trust moneys bequeathed upon trust for them respectively) in equal shares, except that Alice E. Christian and Emily J. L. Tod were given a general power of appointment of part of their legacies of 6000*l.* each. Then the will proceeded as follows: (2.) "*And I direct that the sum or sums so becoming divisible to my said sons and daughters respectively shall be considered as an addition or additions to the sums hereinbefore or hereinafter given, upon trust for them respectively and be disposed of accordingly.* (3.) *But I declare that this my will is made on the assumption that the residuary real and personal estate disposed of hereby (including the money to the income of which my wife is entitled under the trusts of the settlement executed on our marriage, and the sums of 5000l. and 2300l., or thereabouts, which I have paid on account of my son John Henry Tod, and which sums are to be deducted from the share of my residuary estate hereinafter given in trust for his wife and family) after payment thereout of my debts, funeral and testamentary expenses, and the legacies hereby given (other than legacies to my said wife or any of my said children) will amount to upwards of* 60,000*l.*" Then the will proceeded as follows: "(4.) *And I direct my said trustees to stand possessed of the residue of my said residuary estate, after payment thereout of the moneys hereinbefore mentioned, as to one half thereof, upon trust to pay, transfer, or invest the same in the names of my said wife and my said son Alexander Maxwell Tod, to be held by them . . . . upon trust to pay the income thereof to Mary Tod, wife of J. H. Tod, for her separate use for life, and after her death for the benefit of J. H. Tod, his wife for the time being, and his children and more remote issue, and, after the decease of J. H. Tod and his wife Mary," upon certain trusts in favour of their children.* Then the will proceeded as follows: "And I direct my said first

SARGANT J. named trustee to stand possessed of the other moiety of the said residue of my estate, Upon trusts," subject to raising a sum of 5000*l.* for A. M. Tod, for investment, and to pay the annual produce thereof to A. M. Tod for life (subject to a forfeiture clause which is immaterial to this report). After A. M. Tod's death the investments of his share were to go as to 3000*l.* to his wife, Belle, for life, and after her death, as to that sum and the rest of A. M. Tod's share in residue, upon trust for his children. The will also contained the following provisions: (5.) (*a*) " *Provided always, that, if I shall at any time hereafter give to any son or daughter of mine any sum of money exceeding the sum of* 1000*l. sterling, at any one time, any sum or sums of money so advanced shall be considered as a payment by me on account of the sums hereinbefore bequeathed to or in trust for him or her or his or her children, and the amount so given* (*with interest from the day of the date of such advance*) *shall be brought into account and deducted from the sum hereinbefore bequeathed to him or her.*" (*b*) " And I direct that all investments to be made in pursuance of my will shall be made " in certain specified securities, " with full power to continue any investments I may have at the time of my death for such time as my trustees may think proper." (*c*) " And I declare that it shall be lawful for my trustees to postpone the sale of my freehold property for as long as they may think proper, and, so long as any freehold or leasehold property hereinbefore given to them shall remain unsold, to grant leases of such unsold freehold and leasehold property for such term or terms of years, for such purposes, at such rents, and subject to such conditions as my trustees shall think expedient. I direct that the trusts and powers hereinbefore confided to my trustees herein named may be exercised by the trustees or trustee for the time being of this my will. And I also declare that the power to appoint new trustees of this my will shall be vested in the surviving or continuing trustees or trustee or in the executors or administrators of the last surviving trustee, and that on the occasion of any appointment of a new trustee or new trustees of this my will it shall be lawful for the person or persons making such appointment at pleasure either to increase or diminish the number of trustees, and that it shall be lawful for the person or persons making such appointment to appoint different sets of trustees of

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the respective moneys or shares hereinbefore bequeathed to or for the benefit of my said sons and daughters, or of the funds respectively representing the same."

The two codicils to the will are not material to this report.

The testator died on July 8, 1893, and, his widow having renounced probate, the will and codicils were proved by J. H. Tod and A. M. Tod.

The widow died in December, 1894, and J. H. Tod died in 1904. A. M. Tod was adjudicated a bankrupt on February 23, 1909, and died in July, 1914, without having obtained his discharge. Maurice E. Turner was in July, 1904, appointed a trustee of the will and codicils in the place of J. H. Tod, and Emily J. L. Tod's legacy of 6000*l.* was transferred to separate trustees. On June 10, 1912, Henry C Bradshaw, Arthur B. Brown, and Henry Scott were appointed trustees of the will and codicils, in the place of A. M. Tod and in addition to M. E. Turner (except as to Emily J. L. Tod's legacy of 6000*l.* and another legacy); Henry Scott was appointed a trustee in the place of A. M. Tod, and in addition to M. E. Turner, in respect of the property appropriated to J. H. Tod's share; and H. C. Bradshaw and A. B. Brown were appointed trustees, in the places of A. M. Tod and M. E. Turner, in respect of the property appropriated to A. M. Tod's share.

A large part of the testator's estate remained unrealized down to the issuing of the summons mentioned below, and a considerable part of the estate consisted of house property.

A number of investments were, from time to time down to 1910, appropriated to the two settled shares, the appropriations to A. M. Tod's share having exceeded those to J. H. Tod's share by 3300*l.*, and thereby the amount remaining to be accounted for by J. H. Tod's share was reduced to 4000*l.*

It was now proposed, with the consent of the various persons interested (as to some who were infants subject to the approbation of the Court), to have a scheme of division of the estate still remaining unappropriated between the two moieties.

The income of the unappropriated estate had in 1909, 1910, 1911, and 1912 been applied on the principle of *In re Hargreaves* (1), and in 1913 and 1914 the income had been distributed on the principle of *In re Poyser*. (2)

(1) 88 L. T. 100. (2) [1908] 1 Ch. 828.

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The questions now raised by originating summons, taken out by the trustees of A. M. Tod's share, related both to capital and to income, and were whether the distribution of income in the years 1909—1912, on the principle of *In re Hargreaves* (1), was right, and whether now, in the apportionment of the capital between the two shares, the apportionment ought to be on a corresponding principle, or whether, on the other hand, the principle of *In re Poyser* (2) ought to have been applied, and there should have been paid to A. M. Tod's share during the years 1909—1912 interest at 4 per cent. on the amount remaining to be equalized, with a division of the residue of the income; and in the same way whether, on appropriation of the capital, there ought (as the scheme provided) to be first appropriated to that share property of the value of 4000*l.*, which was the amount remaining to be equalized, and then an equal distribution should be made of the balance.

Horace Freeman, for the plaintiffs. Before the decision of the Court of Appeal in *In re Hargreaves* (1) the settled rule applicable in cases of this kind was the rule applied in *In re Rees.* (3) In that case Jessel M.R. had before him what he called "an ordinary gift of residue upon trust for the testator's wife for life with remainder to his children equally, with a proviso for their bringing into hotchpot sums which he had advanced to them during his lifetime." Several of the testator's children had received advances in his lifetime, and the question for decision was, how were the children to bring the advances into hotchpot? Jessel M.R. pointed out that the children got no income until the widow's death; that all the children then took equally; that for the purposes of division the Court must consider the estate as then ascertained; and that if there was no immediate division interest was to be calculated at 4 per cent. as from the widow's death, and not as from the dates of the advances or as from the testator's death. In *In re Dallmeyer* (4) the Court of Appeal accepted the rule stated in *In re Rees* (3) and held that an advanced beneficiary was not to be debited with interest prior to the period of distribution. In

(1) 88 L. T. 100.
(2) [1908] 1 Ch. 828.
(3) 17 Ch. D. 701, 703.
(4) [1896] 1 Ch. 372.

In re Lambert (1) Stirling J. said he "must adhere to the rule which is laid down in all the cases down to that of *In re Dallmeyer*" (2), except that he gave interest at 3 instead of 4 per cent., and he pointed out that in the judgments of Lord Herschell and A. L. Smith L.J. in that case "not a word is said about overruling *In re Rees* (3) or departing from anything which was there decided." The ruling of Stirling J. as to the rate of interest being 3 per cent. has since been corrected by the Court of Appeal: *In re Davy.* (4)

Coming now to the decision of the Court of Appeal in *In re Hargreaves* (5), although there is no report of the argument of counsel to show whether *In re Rees* (3) and other earlier cases were cited, it is impossible to suppose that the members of the Court were unmindful of those cases; in fact Romer L.J., when at the Bar, was one of the counsel in *In re Rees.* (3) Nor can the decision in *In re Hargreaves* (5) have intended to lay down a general rule in conflict with *In re Rees* (3) and *In re Dallmeyer.* (2) Collins M.R. confined himself to construing the will as meaning that the rights of the parties were to be ascertained as at the testator's death. On that particular construction of that particular will the Court held that, to ascertain the proportions of the settled shares of the children, the value of the net residue at the testator's death should be found, that thereto the several advances should be added, and that the actual income received from and after the death should be divided in the respective proportions so ascertained; that each child's share in such income ought to be debited with an equal share of the widow's annuity; and that no calculation of interest on a child's advance was necessary. Romer L.J. relies on the fact that the widow had not a life interest in the residue, but only an annuity for her life payable out of it. The principle applied in *In re Hargreaves* (5) was adopted as the proper one in that case, but it is not the rule generally applicable.

The view that no general rule was intended to be laid down by *In re Hargreaves* (5) has been taken by Warrington J. in *In re Poyser* (6) and in *In re Craven* (7), by Buckley L.J. in *In re*

(1) [1897] 2 Ch. 169, 174, 180.
(2) [1896] 1 Ch. 372.
(3) 17 Ch. D. 701.
(4) [1908] 1 Ch. 61.
(5) 88 L. T. 100.
(6) [1908] 1 Ch. 828.
(7) [1914] 1 Ch. 358.

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Willoughby (1), and by your Lordship in *In re Forster-Brown.* (2) According to a mere Weekly Note, *In re Hargreaves* (3) was followed by Neville J. in *In re Gilbert* (4) and by Eve J. in *In re Hart* (5), but in the latter case the earlier decisions were not cited. The principle of *In re Rees* (6), *In re Poyser* (7), *In re Craven* (8), and *In re Forster-Brown* (2) should be applied in the present case.

Roope Reeve, for parties in the same interest, referred to *In re Cooke.* (9)

Cecil W. Turner, for the persons interested in J. H. Tod's share. It must be assumed here that the law was correctly laid down in *In re Hargreaves.* (3) Every element to be found in that case is present here, and it is submitted that the principle of it applies. In *In re Craven* (8) the facts were complicated by part of the estate consisting of shares which could not be realized. Many of the circumstances on which the Court relied in *In re Forster-Brown* (2) are absent here. In *In re Gilbert* (4) and *In re Hart* (5) the Court found no difficulty in following *In re Hargreaves.* (3)

Fairfax Luxmoore, for other parties.

SARGANT J. This case raises the question of the limits of the application of the rule or principle in *In re Hargreaves.* (3)

In the present case the will of the testator is a comparatively simple one, and was made on January 18, 1892. He died shortly afterwards, and his wife died on December 25, 1894, and they had several children. His widow appears to have been amply provided for by settlements, and he makes no provision for her by his will, except that he allows her the use of his house at Walmer called "Walmer Lodge," and provides that she may also have the use of the plate and so on. The material part of the will is this: [His Lordship referred to the part of the will which is above set out in italics and numbered (1.), and continued as follows:] Then he provided for four sums of 6000*l.* each, one for each of his daughters, and for the settlement of the sum left to the daughter who was unmarried at the date of the will, the other three sums being given

(1) [1911] 2 Ch. 581, 600.
(2) [1914] 2 Ch. 584.
(3) 88 L. T. 100.
(4) [1908] W. N. 63.
(5) (1913) 107 L. T. 757.
(6) 17 Ch. D. 701.
(7) [1908] 1 Ch. 828.
(8) [1914] 1 Ch. 358.
(9) Ante, p. 480.

to the trustees of the marriage settlements of the three daughters who were then already married. Then there is the following direction: [His Lordship read the part of the will which is above set out in italics and numbered (2.), and continued:] That has no very special application to the circumstances which I have now to consider. [His Lordship read the part of the will which is above set out in italics and numbered (3.), and continued:] So the will is to be construed on that assumption. Then the will proceeded as follows: [His Lordship read the part of the will which is above set out in italics and numbered (4.), and continued:] Then the testator directs the general trustees of his will (who were different persons from the trustees of J. H. Tod's share) to hold the other moiety of the residue upon trust, after raising 5000*l.* in trust for A. M. Tod, and then for his wife and family. There is another material clause which I ought to refer to, although it did not actually take effect. [His Lordship read the part of the will which is above set out in italics and numbered (5.), and continued:]

Now what happened was as follows: A large part of the testator's estate remained unrealized down to the date of the present application, and a considerable part of it consisted of house property at Walmer. A number of investments were, from time to time down to 1910, appropriated to the two settled shares, the appropriations to A. M. Tod's share exceeding those to J. H. Tod's share by 3300*l.*, and thus the amount remaining to be accounted for by J. H. Tod's share has been reduced to 4000*l.* It is now proposed, with the consent of the various persons interested (as to some who were infants, subject to the approbation of the Court), to have a scheme of division of the estate still remaining unappropriated between the two moieties. The income of the unappropriated estate in 1909, 1910, 1911, and 1912 was applied on the principle of *In re Hargreaves* (1), and in 1913 and 1914 the income was distributed on the principle of *In re Poyser.* (2)

The question now raised by originating summons taken out by the trustees of A. M. Tod's share relates both to capital and to income, namely, whether the distribution of income during 1909, 1910, 1911, and 1912 on the principle of *In re Hargreaves* (1) was right, and whether now in the apportionment of the capital between

(1) 88 L. T. 100. (2) [1908] 1 Ch. 828.

SARGANT J. 1916 TOD, *In re.* BRADSHAW *v.* TURNER.

the two shares the apportionment ought to be on a corresponding principle, or whether, on the other hand, the principle of *In re Poyser* (1) ought to have been applied and there should have been paid to A. M. Tod's share during the years mentioned interest at 4 per cent. on the amount remaining to be equalized, with a division of the residue of the income equally; and in the same way whether, on appropriation of the capital, there ought (as the scheme provides) to be first appropriated to that share property of the value of 4000*l.*, which was the amount remaining to be equalized, and then an equal distribution should be made of the balance.

Now I think that, for the purpose of dealing with this very simple case, I ought to have regard to general principles and consider how the law stood before *In re Hargreaves* (2) was decided. As to that, there does not seem to be any doubt at all. Whether for the purpose of making good an advance within the language of the Statute of Distributions, or for the purpose of equalizing an advancement made after the date of the will, where the will directed the distribution of the residue in equal shares between children, or, in the third case of a will giving the residue amongst children, with a special provision that advancements made prior to the date of the will ought to be deducted, or brought into account, or brought into hotchpot, or debited, the universal practice of the Court was, I think, that which was stated by Jessel M.R. in *In re Rees* (3), namely, that the advanced children must bring their advances into hotchpot with interest at 4 per cent. per annum from the time for distribution to the time of actual distribution. The Master of the Rolls was dealing there with a case where distribution was postponed until the widow's death, and he held that the sums advanced carried interest only as from her death. He stated the practice of the Court quite generally, and I do not think that any question as to that practice could possibly have been raised before the decision of *In re Hargreaves*. (2) *In re Lambert* (4) is a decision of Stirling J. to the same effect, although he only allowed interest at the rate of 3 per cent.—a rate which has since been corrected to 4 per cent.

Then came *In re Hargreaves* (2), which has been very frequently commented upon, and generally distinguished. In my opinion,

(1) [1908] 1 Ch. 828.
(2) 88 L. T. 100.
(3) 17 Ch. D. 701.
(4) [1897] 2 Ch. 169.

as I have already stated in *In re Forster-Brown* (1), *In re Hargreaves* (2) was an extremely special case, and one which depended upon the particular language employed in the will, and on that language as interpreted by Romer and Cozens-Hardy L.JJ. I think the language of the present Master of the Rolls (3) is the more general in its application, and therefore I will read that: "On the language of this will I cannot doubt that an actual ascertainment of the shares as from the moment of the testator's death was contemplated. The hotchpot clause contains an express provision that the securities that are to be brought into hotchpot are to be ascertained at the average price of the day at his death. It would be very singular indeed if part were to be ascertained in that way and the rest not." Both he and Romer L.J. clearly thought that there were special provisions in that case for the fractional ascertainment of the shares of the estate at the date of the death as at the then present values of the assets forming part of that estate, which mainly consisted of railway stocks and Stock Exchange securities. Since *In re Hargreaves* (2) Warrington J. has dealt with more or less similar cases in *In re Poyser* (4) and *In re Craven* (5), and in each case he has distinguished *In re Hargreaves* (2) and clearly indicated his opinion that it was a very special case not affecting the general practice of the Court; and certainly I can find in the case of *In re Hargreaves* (2), as reported, absolutely nothing whatever to suggest that it was intended there in any way to question or alter the ordinary practice of the Court in an ordinary case of advancement with a direction for bringing the advance into account. And further Buckley L.J. in *In re Willoughby* (6) refers to *In re Hargreaves* (2) as being a decision founded on the particular facts of that case, and a very special case.

As against that there is a note of a decision of Neville J. in *In re Gilbert* (7), but that note is not sufficiently full to justify me in drawing any real inference as to the exact provisions of the will or the precise grounds on which the learned judge proceeded. Again Eve J. in *In re Hart* (8) seems to have come to the conclusion that the

(1) [1914] 2 Ch. 584.
(2) 88 L. T. 100.
(3) 88 L. T. 101.
(4) [1908] 1 Ch. 828.
(5) [1914] 1 Ch. 358.
(6) [1911] 2 Ch. 581, 600.
(7) [1908] W. N. 63.
(8) 107 L. T. 757.

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principle of *In re Hargreaves* (1) ought to be applied there; but I think that Eve J. considered that the scheme of the will there was such as to render the decision in *In re Hargreaves* (1) more applicable than that in *In re Poyser* (2), and apparently those two cases were the only authorities to which he was referred. He was not taken back at all to the question of the general practice of the Court antecedent to *In re Hargreaves* (1); and *In re Rees* (3) and *In re Lambert* (4) do not appear to have been cited to him. It appears to me that the decision is only valuable, therefore, with reference to the particular will which the learned judge had to construe there, and was not really intended to deal with the general practice of the Court. In my judgment, the general practice of the Court has not been affected by that case, and, if one considers it on principle, I do not see how a direction that an advance shall be debited against a share or shall be deducted as against a share or shall be brought into hotchpot can, when the advance has been made in money, be properly given effect to except by crediting the unadvanced shares for the purposes of the division with the money advanced, and distributing the estate upon the basis that the money advanced with proper interest should be first paid to the owners of the unadvanced shares, and that then the residue should be distributed equally.

It seems to me that it is a considerable refinement to equalize an advance of money by setting off against it a fractional share of an estate; and that, although that ought to be done where the language of a will such as that interpreted by the Court of Appeal in *In re Hargreaves* (1) specially directs that the problem should be so treated, still in an ordinary common form case of the kind now before the Court the advance of money ought to be equalized by making up to the unadvanced share a sum of money, and not a fractional proportion of residue. Until *In re Hargreaves* (1) it would have been impossible to raise any question here at all, although, in view of that decision, the question was rightly raised in the present case. I hope that some case of this kind will shortly be taken to the Court of Appeal so that the general doctrine of the Court may be settled, either by way of affirming the general practice before *In re Hargreaves* (1) was decided, or by laying down

(1) 88 L. T. 100.
(2) [1908] 1 Ch. 828.
(3) 17 Ch. D. 701.
(4) [1897] 2 Ch. 169.

affir matively that in ordinary cases the principle of that case ought to be followed. As things are, I hold that the method adopted in 1913 (in accordance with *In re Poyser* (1)) was the correct method.

SARGANT J. 1916 TOD, *In re.* BRADSHAW *v.* TURNER.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley; E. F. Turner & Sons; Oldfields.*

F. E.

In re LEAPER.

BLYTHE *v.* ATKINSON.

SARGANT J. 1916 *April* 18, 19.

[1915 L. 1773.]

Donatio mortis causa—Gift of Donor's own Promissory Note.

A donor's own promissory note is not the subject of a donatio mortis causa.

WILLIAM LEAPER on December 9, 1914, having made and signed two promissory notes, expressed to be "for value received," gave one to Sarah Letitia Thompson, being for 100*l.* and interest at 4*l.* per cent. and payable on demand to her, and the other to Mary Thompson, being for 130*l.* and interest at 4*l.* per cent. and payable on demand to her or her order.

When the notes were given Leaper was suffering from a painful and incurable malady, and, as his Lordship found, must have known that there was no prospect of recovery, although on his part there was no imminent expectation of death.

The notes were not presented for payment before the testator's death, which took place on February 21, 1915, but after the death the donees of the notes presented the notes to Leaper's executors and claimed payment of the amounts thereof.

Leaper's executors took out an originating summons, to which the two donees of the notes, the residuary legatees under Leaper's will, and other persons were defendants, raising (inter alia) the question whether the plaintiffs, as executors, might properly pay out of their estate, as debts, or gifts mortis causa, or otherwise, to the defendants

(1) [1908] 1 Ch. 828.

SARGANT J. 1916 LEAPER, *In re.* BLYTHE *v.* ATKINSON.

S. L. Thompson and Mary Thompson the amounts of the two notes given to them, with interest.

Horace Freeman, for the executors, stated the facts and the questions involved.

Maugham, K.C., and *E. A. Farleigh*, for the defendants S. L. Thompson and Mary Thompson. On the evidence the claims on the notes are supportable on the ground that they were given for valuable consideration in the shape of services rendered by the donees of the notes to the testator during his lifetime. In the alternative, it is contended that a promissory note under the donor's hand may be the subject of a donatio mortis causa. Such a note stands on a different footing from the donor's own cheque, as the authority to pay given by the latter is revoked by the donor's death. The promissory note of a person other than the donor, which is payable to order, may be the subject of a donatio mortis causa, and will pass thereby though unindorsed: *Veal* v. *Veal*. (1) The bond of a person other than the donor stands in the same position: *Gardner* v. *Parker*. (2) And so does a bill of exchange payable to the donor but not due at the time of his death or indorsed by him: *In re Mead*. (3) And a banker's deposit note, on which there is an indorsed form of cheque which has been signed by the donor, may be the subject of a donatio mortis causa: *In re Dillon*. (4)

These notes are negotiable instruments, and the donees can by negotiating them make the donor a debtor. It is the executors' duty in equity to perfect the gift, and not to set up want of consideration as a defence to the donees' claims.

Roope Reeve, for the residuary legatees under Leaper's will. The contention and evidence to show that the donor intended to make an immediate and irrevocable gift destroy the title of a party who claims to take under a donatio mortis causa: *Edwards* v. *Jones*. (5)

A promissory note under the donor's own hand cannot be the subject of a donatio mortis causa. "Speaking broadly, the subjects of donationes mortis causa must be things the title to which, or the

(1) (1859) 27 Beav. 303.
(2) (1818) 3 Madd. 184.
(3) (1880) 15 Ch. D. 651.
(4) (1890) 44 Ch. D. 76.
(5) (1836) 1 My. & Cr. 226.

evidence of title to which, passes by delivery" : per Bowen L.J. in *In re Hughes.* (1) A promissory note signed by the donor stands very much in the same position as a cheque signed by him. In *Bromley* v. *Brunton* (2) a cheque was signed by the donor and given to the donee, who presented it at once. The bankers had sufficient assets of the donor to honour the cheque, but refused payment because they doubted the signature. The next day the donor died, the cheque not having been paid, and Stuart V.-C. held that there was a complete gift, not mortis causa, but inter vivos. "Probably he meant," as Buckley J. says in *In re Beaumont* (3), "that the effect of the cheque coupled with the bankers' action on it was to appropriate enough of the money at the bank to meet the cheque—that the bankers, so to speak, constructively honoured the cheque." In the same case Buckley J. says (4) that in all the cases, in order that the gift may be valid as a donatio mortis causa, it must "be shown that the donor handed over either property, or the indicia of title to property, which belonged to him"; and he held that the donor's own cheque was not property but only a revocable order. In *Holliday* v. *Atkinson* (5) Abbott C.J. says: "A promissory note is not good as a donatio mortis causa." [He also referred to Halsbury's Laws of England, vol. xv. pp. 433, 434.]

Maugham, K.C., in reply.

SARGANT J. (after referring to the evidence). Now two questions arise with regard to this matter. The first is whether the gift of the promissory note in either case constituted a donatio mortis causa in the sense that the testator—as I will call him—was making a gift which was intended to be effectual only in the event of his death, or whether he was making an out-and-out gift. The second question is whether the testator's own promissory note could be a proper subject of a donatio mortis causa.

As regards the first question, I have come to the conclusion, in all the circumstances of the case, that the testator was intending to make these ladies an out-and-out gift, and not a gift conditional on his death. [His Lordship referred to the evidence and continued :]

(1) (1888) 59 L. T. 586, 587.
(2) (1868) L. R. 6 Eq. 275.
(3) [1902] 1 Ch. 889, 895.
(4) [1902] 1 Ch. 894.
(5) (1826) 5 B. & C. 501, 503.

SARGANT J. 1916 LEAPER, *In re.* BLYTHE *v.* ATKINSON.

In my view, all the circumstances tend to show that he was intending to benefit these ladies to a greater and more immediate extent than would have been the case if he had merely been making a donatio mortis causa; and, that being so, the very fact that he intended to give them more has unfortunately resulted in his not giving them anything.

The second point is one of general law, and I will say something about it, although it is not strictly necessary to decide it in view of the conclusion to which I have already come. On the whole, I think that the better view is that a donor's own promissory note is not a proper subject of a donatio mortis causa. The matter is dealt with by Buckley J. in *In re Beaumont* (1), where he says: "In all the cases, in order that the gift may be valid, it must I think be shown that the donor handed over either property, or the indicia of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates." And I can find no instance whatever in the books of a gift of either a donor's own promissory note, or a donor's own cheque held uncashed, being held to be effective as a donatio mortis causa, except in *Bromley* v. *Brunton* (2), a decision of Stuart V.-C., which, as explained by Buckley J. in *In re Beaumont* (3), is not really an authority at all for the view that the gift of a donor's own cheque is in itself sufficient.

If the donor is giving somebody else's promissory note, he is then handing over the indicia of title to a species of property belonging to the donor. If he is handing over his own promissory note or cheque —particularly in the former case—he seems to me to be doing something quite different. The note, while in the donor's hands, is not property. And, by handing it to the donee, he is not transferring or attempting to transfer property, but is merely making an attempt—in itself imperfect—to create a general liability against himself, or rather against his estate. It may be that to deprive the executors of the donor in such a case of the right to plead want of consideration is no greater interference than to compel them in the ordinary case to perfect an imperfect

(1) [1902] 1 Ch. 894. (2) L. R. 6 Eq. 275.
(3) [1902] 1 Ch. 895.

transfer. But it is a different interference, and its adoption would, I think, involve the creation of a new class of donationes mortis causa.

Further, there is a dictum of Abbott C.J. in *Holliday* v. *Atkinson* (1) directly to the effect that a person's own promissory note is not a proper subject of a donatio mortis causa, and the remarks of Bowen L.J. in *In re Hughes* (2) are to the same effect. In view of these expressions and of the judgment of Buckley J. in *In re Beaumont* (3) I think that, at any rate in a Court of first instance, it is impossible to hold that a gift either of a donor's own cheque, which is uncashed, or of a donor's own promissory note, can be effectual as a donatio mortis causa.

Unfortunately, therefore, I must decide against the claimants on both the two grounds which I have stated.

Solicitors for executors and residuary legatees: *Collyer-Bristow, Curtis, Booth, Birks & Langley.*

Solicitors for claimants: *C. J. Smith & Hudson.*

(1) 5 B. & C. 501, 503. (2) 59 L. T. 586, 587.
(3) [1902] 1 Ch. 889.

F. E.

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W. by his will appointed D. to be one of his executors and trustees and gave a legacy of 2000*l.* (which had not yet been paid) to D.'s wife. She died without having received the legacy, and having bequeathed the whole of her property to her husband, whom she appointed to be her executor. D. died insolvent without having proved his wife's will. By his own will he appointed executors to whom administration with the will annexed of his wife's estate was granted. On his death it was discovered that he had misappropriated 1500*l.*, part of W.'s estate:—

Held, that the surviving trustee and executor of W.'s will was entitled to retain the legacy as against D.'s liability to make good his default.

Decision of Sargant J. [1915] 2 Ch. 480 affirmed.

Jacubs v. *Rylance* (1874) L. R. 17 Eq. 341 and *Doering* v. *Doering* (1889) 42 Ch. D. 203 followed. *In re* DACRE. WHITAKER *v.* DACRE **C. A. 344**

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Affirmed – **C. A. [1916] 1 Ch. 344**

—— *Denholm's Trustees* v. *Denholm*, 1908 S. C. 43; 45 S. L. R. 32.
Approved but not followed. *In re* WHITE. WHITE *v.* WHITE **[1916] 1 Ch. 172**

—— *D'Huart* v. *Harkness* – (1865) 34 Beav. 324
Approved and followed. *In re* SIMPSON. COUTTS & CO. *v.* CHURCH MISSIONARY SOCIETY **[1916] 1 Ch. 502**

—— *Doering* v. *Doering* – (1889) 42 Ch. D. 203
Followed. *In re* DACRE. WHITAKER *v.* DACRE – **C. A. [1916] 1 Ch. 344**

—— *Dungannon (Lord)* v. *Smith* (1846) 12 Cl. & F. 546.
Followed. *In re* ATKINSON. ATKINSON *v.* ATKINSON – – **[1916] 1 Ch. 91**

—— *Edwards* v. *Carter* – [1893] A. C. 360
Applied. CARNELL *v.* HARRISON **C. A. [1916] 1 Ch. 328**

—— *Embury, In re* – (1913) 109 L. T. 511
Distinguished. *In re* TIMSON. SMILES *v.* TIMSON – – **[1916] 1 Ch. 293**

—— *Eno* v. *Dunn* – (1890) 15 App. Cas. 252
Applied. *In re* GARRETT'S APPLICATION – – **C. A. [1916] 1 Ch. 436**
Referred to. *In re* GEO. CORDING, LD.'S APPLICATION – **C. A. [1916] 1 Ch. 422**

—— *Eyre* v. *Marsden* – (1838) 4 My. & Cr. 231
Followed. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER **[1916] 1 Ch. 272**

—— *Forster-Brown, In re* – [1914] 2 Ch. 584
Followed. *In re* COOKE. RANDALL *v.* COOKE – – **[1916] 1 Ch. 480**

—— *Foveaux, In re* – [1895] 2 Ch, 501, 504
Applied. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL **[1916] 1 Ch. 100**

—— *Francis, Day & Hunter* v. *Feldman & Co.* [1914] 2 Ch. 728.
Referred to. GLYN *v.* WESTON FEATURE FILM CO. **[1916] 1 Ch. 261, 268**

CASES—*continued.*

—— *Freme, In re* – – [1891] 3 Ch. 167
Applied. *In re* ROBSON. DOUGLASS *v.* DOUGLASS – **[1916] 1 Ch. 116**

—— *Giles, In re* – – (1886) 55 L. T. 51
Followed. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER **[1916] 1 Ch. 272**

—— *Gleeson* v. *Byrne* – (1890) 25 Ir. L. R. 361
Distinguished. *In re* WILSON. WILSON *v.* CLARK – – **[1916] 1 Ch. 220**

—— *Governments Stock Investment Co.* v. *Manila Ry. Co.* [1897] A. C. 81, 86.
Applied. NATIONAL PROVINCIAL BANK OF ENGLAND, LD. *v.* UNITED ELECTRIC THEATRES, LD. – **[1916] 1 Ch. 132**

—— *Greener* v. *E. Kahn & Co.* [1906] 2 K. B. 374.
Observations on. RAINBOW *v.* KITTOE **[1916] 1 Ch. 313**

—— *Groom, In re* – [1897] 2 Ch. 407, 411
Referred to. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER **[1916] 1 Ch. 272, 277**

—— *Hall, In re* (1912) 107 L. T. 196; [1912] W. N. 175.
Followed. *In re* WHITE. WHITE *v.* WHITE – – **[1916] 1 Ch. 172**

—— *Hall's Estate. In re* (1870) L. R. 9 Eq. 179
Distinguished. *In re* WILSON. WILSON *v.* CLARK – – **[1916] 1 Ch. 220**

—— *Hampden* v. *Earl of Buckinghamshire* [1893] 2 Ch. 531.
Referred to. *In re* STAMFORD AND WARRINGTON (EARL) **[1916] 1 Ch. 404**

—— *Hanfstaengl* v. *Empire Palace* [1894] 3 Ch. 109, 128.
Observations of Lindley L.J. in, referred to. GLYN *v.* WESTON FEATURE FILM CO. – – **[1916] 1 Ch. 261, 268**

—— *Hardwicke (Earl of)* v. *Douglas* (1840) 7 Cl. & F. 795.
Followed. *In re* STOODLEY. HOOSON *v.* LOCOCK – **C. A. [1916] 1 Ch. 242**

—— *Hargreaves, In re* – (1903) 88 L. T. 100
Distinguished. *In re* COOKE. RANDALL *v.* COOKE – – **[1916] 1 Ch. 480**
Referred to. *In re* TOD. BRADSHAW *v.* TURNER – – **[1916] 1 Ch. 567**

—— *Harrington, In re* – [1908] 2 Ch. 687
Distinguished. *In re* STILLWELL. BRODRICK *v.* STILLWELL **[1916] 1 Ch. 365**

—— *Harrop* v. *Wilson* – (1865) 34 Beav. 166
Distinguished. *In re* WILSON. WILSON *v.* CLARK – – **[1916] 1 Ch. 220**

—— *Hastings Corporation* v. *Letton* [1908] 1 K. B. 378.
Referred to. *In re* ALBERT ROAD, NORWOOD (NOS. 56 AND 58) **[1916] 1 Ch. 289**

—— *Hole, In re* – – [1906] 1 Ch. 673
Followed. *In re* WILSON. WILSON *v.* CLARK – – – **[1916] 1 Ch. 220**

CASES—*continued.*

—— *Hudson, In re* – (1895) 72 L. T. 892
Commented on. *In re* HUGHES. LODDIGES *v.* JONES – **[1916] 1 Ch. 493**

—— *Hummel* v. *Hummel* – [1898] 1 Ch. 642
Referred to. *In re* SIMPSON **[1916] 1 Ch. 502**

—— *Ibbetson* v. *Ibbetson* (1840) 5 My. & Cr. 26
Followed. *In re* ATKINSON. ATKINSON *v.* ATKINSON – **[1916] 1 Ch. 91**

—— *Illingworth* v. *Houldsworth* [1904] A. C. 355.
Referred to. NATIONAL PROVINCIAL BANK OF ENGLAND, LD. *v.* UNITED ELECTRIC THEATRES, LD. **[1916] 1 Ch. 132**

—— *Income Tax Commissioners* v. *Pemsel* [1891] A. C. 531, 583.
Applied. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL **[1916] 1 Ch. 100**

—— *Jacubs* v. *Rylance* (1874) L. R. 17 Eq. 341
Followed. *In re* DACRE. WHITAKER *v.* DACRE – **C. A. [1916] 1 Ch. 344**

—— *Jenour* v. *Jenour* (1805) 10 Ves. 562, 571
Distinguished. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER **[1916] 1 Ch. 272, 277**

—— *Jones, In re* – – [1893] 2 Ch. 461
Disapproved. CARNELL *v.* HARRISON **C. A. [1916] 1 Ch. 328**

—— *Jones's Will, In re* – (1870) 23 L. T. 211
Approved. *In re* SMITH. SMITH *v.* SMITH – – **[1916] 1 Ch. 369**

—— *Kirwan's Trusts, In re* (1883) 25 Ch. D. 373.
Dictum of Kay J. in, dissented from. *In re* SIMPSON. COUTTS & CO. *v.* CHURCH MISSIONARY SOCIETY **[1916] 1 Ch. 502**

—— *L'Estrange* v. *L'Estrange* [1902] 1 I. R. 467.
Followed. *In re* DUNN. CARTER *v.* BARRETT – – **[1916] 1 Ch. 97**

—— *Linton* v. *Linton* – (1885) 15 Q. B. D. 239
Referred to. *In re* STILLWELL. BRODRICK *v.* STILLWELL **[1916] 1 Ch. 365**

—— *Liverpool and London and Globe Insurance Co.* v. *Bennett* [1912] 2 K. B. 41, 51.
Referred to. GRESHAM LIFE ASSURANCE SOCIETY *v.* ATTORNEY-GENERAL **[1916] 1 Ch. 228**

—— *Luckraft* v. *Pridham* (1877) 6 Ch. D. 205
Applied. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL **[1916] 1 Ch. 100**

—— *Macduff, In re* – – [1896] 2 Ch. 451
Distinguished. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL **[1916] 1 Ch. 100**

CASES—*continued.*

—— *Martelli* v. *Holloway* (1872) L. R. 5 H. L. 532.
Distinguished, and a passage in the head-note to this report commented on as being too widely stated. *In re* ATKINSON. ATKINSON *v.* ATKINSON [1916] 1 Ch. 91

—— *Martin* v. *Holgate* (1866) L. R. 1 H. L. 175
Referred to. *In re* TIMSON. SMILES *v.* TIMSON – [1916] 1 Ch. 293, 299

—— *Martineau* v. *Rogers* – (1856) 8 D. M. & G. 328.
Explained. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER [1916] 1 Ch. 272

—— *Menier* v. *Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350.
Distinguished. FOSTER *v.* FOSTER [1916] 1 Ch. 532

—— *Moon, In re* – – [1907] 2 Ch. 304
Referred to. *In re* WELCH. MITCHELL *v.* WILLDERS – [1916] 1 Ch. 375

—— *New British Iron Co., In re* [1898] 1 Ch. 324
Applied. FOSTER *v.* FOSTER [1916] 1 Ch. 532

—— *Parker-Jervis, In re* – [1898] 2 Ch. 643
Followed. *In re* PALMER [1916] 1 Ch. 395

—— *Partington, In re* – [1902] 1 Ch. 711
Distinguished. *In re* STAMFORD AND WARRINGTON (EARL) [1916] 1 Ch. 404

—— *Perring* v. *Trail* – (1874) L. R. 18 Eq. 88
Explained and distinguished. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL – – [1916] 1 Ch. 100

—— *Pike* v. *Nicholas* (1869) L. R. 5 Ch. 251, 260, n.
Referred to. GLYN *v.* WESTON FEATURE FILM CO. [1916] 1 Ch. 261, 271

—— *Poyser, In re* – – [1908] 1 Ch. 828
Followed. *In re* COOKE. RANDALL *v.* COOKE – – [1916] 1 Ch. 480
Referred to. *In re* TOD. BRADSHAW *v.* TURNER – [1916] 1 Ch. 567

—— *Ralph* v. *Carrick* – (1879) 11 Ch. D. 873
Distinguished. *In re* TIMSON. SMILES *v.* TIMSON – – [1916] 1 Ch. 293

—— *Redgate, In re* – – [1903] 1 Ch. 356
Distinguished. *In re* MACKENZIE. BAIN *v.* MACKENZIE [1916] 1 Ch. 125

—— *Rees, In re* – – (1881) 17 Ch. D. 701
Rule laid down in, applied. *In re* TOD. BRADSHAW *v.* TURNER [1916] 1 Ch. 567

—— *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* [1913] A. C. 624.
Applied. *In re* GARRETT'S APPLICATION – – C. A. [1916] 1 Ch. 436

CASES—*continued.*

—— *Robinson* v. *London Hospital* (1852) 10 Hare, 19.
Explained and distinguished. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL – – [1916] 1 Ch. 100

—— *Rodes, In re* – – [1909] 1 Ch. 815
Referred to. *In re* WIX. HARDY *v.* LEMON – – [1916] 1 Ch. 279, 286

—— *Ross* v. *Ross* – – (1855) 20 Beav. 645
Distinguished. *In re* TIMSON. SMILES *v.* TIMSON – – [1916] 1 Ch. 293

—— *St. Catharine's College, Cambridge* v. *Greensmith* [1912] 2 Ch. 280.
Followed. ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* ROSSE – [1916] 1 Ch. 73

—— *Samuel Johnson & Sons* v. *Brock* [1907] 2 Ch. 533.
Approved. WAKEFIELD AND BARNSLEY UNION BANK, LD. *v.* YATES C. A. [1916] 1 Ch. 452

—— *Scotney* v. *Lomer* (1886) 31 Ch. D. 380, 386
Followed. *In re* MACKENZIE. BAIN *v.* MACKENZIE – – [1916] 1 Ch. 125

—— *Sibley* v. *Perry* – (1802) 7 Ves. 522
Applied. *In re* TIMSON. SMILES *v.* TIMSON – – [1916] 1 Ch. 293

—— *Snape, In re* – – [1915] 2 Ch. 179
Distinguished. *In re* PALMER [1916] 1 Ch. 395

—— *Stamford and Warrington (Earl), In re* [1912] 1 Ch. 343.
Referred to. *In re* STAMFORD AND WARRINGTON (EARL) [1916] 1 Ch. 404

—— *Stamford's (Lord) Estate, In re*, 56 L. T. 484.
Referred to. *In re* STAMFORD AND WARRINGTON (EARL) [1916] 1 Ch. 404

—— *Stoodley, In re; Hooson* v. *Locock* [1915] 2 Ch. 295.
Reversed – C. A. [1916] 1 Ch. 242

—— *Strand Wood Co., In re* – [1904] 2 Ch. 1
Referred to. RAINBOW *v.* KITTOE [1916] 1 Ch. 313

—— *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523, 541.
Observations in, applied. NATIONAL PROVINCIAL BANK OF ENGLAND, LD. *v.* UNITED ELECTRIC THEATRES, LD. – – – – [1916] 1 Ch. 132

—— *Tatham* v. *Vernon* – (1861) 29 Beav. 604
Followed. *In re* CLARKE'S SETTLEMENT TRUST. WANKLYN *v.* STREATFIELD – – – [1916] 1 Ch. 467

—— *Thom* v. *Syddall* – – (1872) 26 L. T. 15
Referred to. GLYN *v.* WESTON FEATURE FILM CO. [1916] 1 Ch. 261, 269

—— *Thomas Logan, Ld.* v. *Davis* (1911) 104 L. T. 914.
Distinguished. FOSTER *v.* FOSTER [1916] 1 Ch. 532

CASES—*continued.*

—— *Trethewy* v. *Helyar* – (1876) 4 Ch. D. 53 Followed. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER [1916] 1 Ch. 272

—— *Tubbs, In re* – – [1915] 2 Ch. 137 Followed. *In re* STAMFORD AND WARRINGTON (EARL) [1916] 1 Ch. 404

—— *Tyssen, In re* – – [1894] 1 Ch. 56 Followed. *In re* MACKENZIE. BAIN *v.* MACKENZIE – [1916] 1 Ch. 125

—— *Walpole* v. *Boughton* – (1850) 12 Beav. 622 Followed. *In re* STAMFORD AND WARRINGTON (EARL) [1916] 1 Ch. 404

—— *Webster* v. *Southey* – (1887) 36 Ch. D. 9 Applied. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL [1916] 1 Ch. 100

—— *Wheeler and De Rochow, In re* [1896] 1 Ch. 315. Disapproved of, but followed. *In re* SICHEL'S SETTLEMENT. SICHEL *v.* SICHEL – – [1916] 1 Ch. 358

—— *Whitby* v. *Mitchell* – (1890) 44 Ch. D. 85 Rule in, applied. *In re* CLARKE'S SETTLEMENT TRUST. WANKLYN *v.* STREATFEILD – [1916] 1 Ch. 467

—— *White* v. *Butt* – – [1909] 1 K. B. 50 Observations on. RAINBOW *v.* KITTOE [1916] 1 Ch. 313

—— *Yorkshire Woolcombers Association, In re* [1903] 2 Ch. 284, 295, affirmed sub nom. *Illingworth* v. *Houldsworth* [1904] A. C. 355. Applied. NATIONAL PROVINCIAL BANK OF ENGLAND, LD *v.* UNITED ELECTRIC THEATRES, LD. [1916] 1 Ch. 132

CHARITY—*Charitable Purposes—Preservation for the Benefit of the Nation of Lands and Buildings of Beauty or Historic Interest—Incorporation of Society—Private Act—Construction—Mortmain and Charitable Uses Acts,* 1888 *and* 1891 (51 *&* 52 *Vict. c.* 42 ; 54 *&* 55 *Vict. c.* 73)—*Partial Exemptions implied by Private Act—Woodland Estate—Preservation of Sylvan Beauty—Recreation Grounds Act,* 1859 (22 *Vict. c.* 27).

The plaintiffs were incorporated by a private Act for the purposes (s. 4, sub-s. 1) of promoting the permanent preservation "for the benefit of the nation" of lands and tenements (including buildings) of beauty or historic interest, and as regards lands for the preservation (so far as possible) of their natural aspect, features, and animal and plant life :—

Held, that these purposes were charitable purposes.

Income Tax Commissioners v. *Pemsel* [1891] A. C. 531, 583, and *In re Foveaux* [1895] 2 Ch. 501, 504, applied.

In re Macduff [1896] 2 Ch. 451 and *Blair* v. *Duncan* [1902] A. C. 37 distinguished.

Sect. 3 incorporated the plaintiffs for the above purposes, with power to purchase, take, hold, deal with, and dispose of lands and other property without licence in mortmain :—

Held, that this section merely gave the plaintiffs a licence in mortmain, with possibly a power of sale without the consent of the Charity Commissioners under the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

Webster v. *Southey* (1887) 36 Ch. D. 9 and *Luckraft* v. *Pridham* (1877) 6 Ch. D. 205 applied.

Robinson v. *London Hospital* (1852) 10 Hare, 19, and *Perring* v. *Trail* (1874) L. R. 18 Eq. 88 explained and distinguished.

Sect. 21, sub-s. 2, provided that the plaintiffs' council might by resolution determine that any lands becoming vested in the plaintiffs after the Act were proper to be held for the benefit of the nation, and thereupon such lands should be inalienable :—

Held, that devised lands made inalienable by a resolution within a year of the testator's death were not liable to be sold under the Mortmain and Charitable Uses Act, 1891, but (*semble*) lands not made inalienable within that period must be sold unless an extension of time or retention order was obtained.

Held, also, that with the above exceptions the plaintiffs were subject to all the provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891.

A woodland estate to be preserved with its natural aspect and features and in its present state and condition of sylvan beauty for the reasonable enjoyment of the public is not a recreation ground within the Recreation Grounds Act, 1859. *In re* VERRALL. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* ATTORNEY-GENERAL
Astbury J. 100

CHATTELS—Company—Receiver and manager—Mortgage—Business—Specific business premises — Present and future chattels thereon—Right to use chattels — Construction — Floating charge on chattels—Rates—Priority – – **132**
See COMPANY. 3.

CINEMATOGRAPH FILM—Novel—Burlesque — Immoral tendency — Copyright — Infringement — Plaintiff's right to maintain action – – – – **261**
See COPYRIGHT.

CLASS—Will—Class gift—Contingent remainder—Legal devise — Failure of particular estate — Preservation of entire remainder – – – – – **116**
See WILL. 7.

—— Will—Joint tenancy or tenancy in common — Advancement clause — Class taking original share by substitution – **97**
See WILL. 4.

—— Will—Life interest—Gift in reversion to next of kin—Class, when to be ascertained – – – – – **562**
See WILL. 5.

CLASS—*continued.*
—— Will — Settled estates — Appointment — Fraud—Promise enforced—Invalid appointment – – – – **142**
See WILL. 18.

CODICIL—Bequest by.
See SETTLEMENT and WILL.

COMMONS—Inclosure Act—Underlying minerals — Preamble — Distinction between soil and mines and minerals – – **73**
See INCLOSURE ACT.

COMPANY — *Debenture — Floating Charge — Registered Agreement to give Charge in certain Events—Debenture otherwise than for Cash within Three Months of Winding up—Varying Master's Certificate—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 93, 212—*Rules of the Supreme Court*, 1883, *Order* LV., *rr.* 70, 71.

A company being indebted, in respect of an overdraft, to its bankers, L., one of its directors, gave the bankers security on his own property for the overdraft (3000*l.*), and the company in July, 1914, gave L. an agreement that in the event of (*a*) the bankers pressing the company for the overdraft, or (*b*) the bankers calling on L. to redeem the property charged by him, the company would give L. a debenture containing a floating charge on its assets to secure 3000*l.* and interest, and this agreement was registered under s. 93 of the Companies (Consolidation) Act, 1908. One of the events having happened within three months of the commencement of the winding up of the company, the company on February 1, 1915, gave L. a debenture for 3000*l.* and interest, stating that it was given under the agreement and containing the floating charge therein referred to. This was also registered under s. 93. On February 23, 1915, the company passed an extraordinary resolution for voluntary winding up. L. having died, his executors on February 12, 1915, commenced an action against the company for realization of the assets comprised in two debentures for 3000*l.* and 1000*l.* (both cash) given to L. in 1912 and 1913 (the validity of which was not disputed) and the debenture of February 1, 1915, and on February 19 a motion for a receiver was by consent of the plaintiffs and the company treated as the trial, and judgment was given omitting any declaration of charge, but directing accounts and inquiries, in answer to which the Master found that there was owing to the plaintiffs on the three debentures the sum of 7000*l.* and interest. After the Master's certificate had become binding the liquidator in the winding up took out a summons asking that the certificate might be varied by disallowing the 3000*l.* and interest under the debenture of February 1, 1915 :—

Held—(1.) that there were special circumstances within Order LV., r. 71, entitling the liquidator to have his summons heard ; (2.) that the form of the judgment did not preclude the Court from considering whether the debenture of February 1, 1915, gave an effective charge, having regard to s. 212 of the Companies (Consolidation) Act, 1908 ; and (3.) that that debenture was invalidated under the section by the winding-up resolution ; because, (*a*) assuming in favour of L. and his estate that one of the events referred to in the agreement of July, 1914, occurred about February 1, 1915, the plaintiffs' position was not saved by the agreement, as the debenture was so complete a performance of the executory agreement as to leave no obligation or right still subsisting under it, and (*b*), even if that was not so, the agreement gave no present charge, but merely a right to a floating charge, not as at the date of the agreement, but on the occurrence of one of two events, one of which occurred within three months of the winding up.

Observations as to declaring charges in debenture-holders' actions. *In re* GREGORY LOVE & CO. FRANCIS *v.* THE CO. – **Sargant J. 203**

2. —— *Directors — Chairman — Managing Director — Delegation of Directors' Powers — Duration of Office—Remuneration of Managing Director—Appointment by Directors—Contract with Company—Interested Director prohibited from voting—Invalid Appointment—Power of General Meeting to confirm—Right of Minority to sue—Remuneration of Directors — Power of Company to reduce.*

The articles of association of the defendant company provided (inter alia) that every share should confer one vote both at general meetings of the company and at meetings of the directors, and (by article 89) that the business of the company should be managed by the directors. Article 93 provided that a director might contract with the company, but prohibited a director from voting in respect of any contract in which he was interested, and article 99 empowered the directors from time to time to appoint one of their body to be managing director for such period and at such remuneration as they thought fit.

The plaintiff was appointed director by the company at a remuneration of 300*l.* per annum and chairman and managing director by the board of directors, but without remuneration and for no fixed period. Two years later, at a board meeting of the three directors, the defendant Mrs. F., supported by the third director but opposed by the plaintiff, appointed herself chairman in his place and joint managing director with him, in both cases without remuneration. At a subsequent extraordinary general meeting the company reduced the plaintiff's remuneration as director from 300*l.* to 25*l.* per annum. Some time afterwards, at a board meeting of three directors, Mrs. F., supported by the third director, carried resolutions removing the plaintiff from the office of managing director and appointing herself sole managing director at a substantial remuneration. The plaintiff opposed both resolutions and, upon the latter, demanded a poll, with the result that by means of Mrs. F.'s own votes there was a majority in favour of the resolution appointing her.

In an action by the plaintiff in his individual capacity and also on behalf of the shareholders other than Mrs. F. :—

Held : (1.) that the mere appointment of the plaintiff to be chairman and managing director

COMPANY—*continued.*

did not entitle him to fill those offices for as long as he retained his directorship.

(2.) That when no remuneration was attached to the office the appointment as chairman or managing director was merely a delegation of their powers by the directors to the director so appointed, and did not constitute a contract between him and the company within article 93; *secus*, where remuneration was attached, and that consequently the appointment by Mrs. F. of herself as sole managing director was within the prohibition of that article and invalid.

In re New British Iron Co. [1898] 1 Ch. 324 applied.

(3.) (*a*) That it was competent for the company in general meeting, notwithstanding article 99, to waive the irregularity occasioned by Mrs. F. voting contrary to the prohibition, and to confirm the resolution appointing her, and that the irregularity was, therefore, not of such a character as to give a dissentient minority any right to sue.

Observations of Lord Davey in *Burland* v. *Earle* [1902] A. C. 83 applied.

Menier v. *Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350 and *Thomas Logan, Ld.* v. *Davis* (1911) 104 L. T. 914 distinguished.

(*b*) That the principle of *Barron* v. *Potter* [1914] 1 Ch. 895 also applied, and that, the directors being in the circumstances unable to exercise the powers conferred upon them by the articles, the company in general meeting could make the appointment.

(4.) That the company had power to reduce the remuneration of an existing director and to discriminate between directors in respect of their remuneration; and that the exercise of such power was not part of the business of the company, the management of which was by article 89 delegated to the directors so as to render the same exclusively exercisable by them. FOSTER *v.* FOSTER – – – **Peterson J. 532**

3. —— *Receiver and Manager—Mortgage—Business—Specific Business Premises—Present and Future Chattels thereon—Right to use Chattels—Construction—Floating Charge on Chattels—Rates—Priority—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209.

By a bank mortgage of August 11, 1914, the defendants conveyed and assigned to the plaintiffs (inter alia) their electric theatre business, specific business premises, and all chattels then or thereafter placed thereon.

The mortgage was to secure the defendants' banking account, and it was intended that they might use the chattels in carrying on their business.

The chattels were now in the possession of a receiver and manager appointed in a foreclosure action at a time when certain rates were due from the defendants:—

Held, that so far as both present and future chattels were concerned the mortgage was merely a floating security, so that the charge on the chattels ranked after claims for rates, which were preferential over such a floating charge under the Companies (Consolidation) Act, 1908, ss. 107, 209.

COMPANY—*continued.*

Observations in *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523, 541; *Governments Stock Investment Co.* v. *Manila Ry. Co.* [1897] A. C. 81, 86; and *In re Yorkshire Woolcombers Association* [1903] 2 Ch. 284, 285, affirmed sub nom. *Illingworth* v. *Houldsworth* [1904] A. C. 355, 358, applied. NATIONAL PROVINCIAL BANK OF ENGLAND, LD. *v.* UNITED ELECTRIC THEATRES, LD. – – – **Astbury J. 132**

4. —— Reserve fund—Exchange of shares for shares in new company—Distribution of reserve fund by way of dividend **383** *See* TENANT FOR LIFE AND REMAINDERMAN. 1.

5. —— Shares.
See MORTGAGE.

6. —— *Winding up—Leases to Company—Equitable Mortgage of Demised Premises—Foreclosure—Order directing Assignment—Dissolution of Company before Assignment—Reversion of Term to Lessor—Trustee—Vesting Order—Trustee Act*, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 25, *sub-s.* 1, *and s.* 26—*Petition—Service on Reversioner.*

In 1912 premises were demised for a term of ninety-nine years to a limited company and its assigns at a yearly rent of 7*l.* 10*s.* The company became dissolved in July, 1915, under the provisions of s. 195 of the Companies (Consolidation) Act, 1908, without having assigned the premises in compliance with a foreclosure order obtained by the equitable mortgagee of the company.

Upon the petition of the mortgagee for (1.) a declaration that the company at the date of its dissolution was a trustee of the premises for him within the meaning of the Trustee Act, 1893, (2.) the appointment of a new trustee, and (3.) a vesting order, the Court, having regard to the decision in *Hastings Corporation* v. *Letton* [1908] 1 K. B. 378 (that a lease to a corporation determines upon the dissolution of the corporation without having assigned the term and the lessor's reversion is accelerated), ordered the petition to be served on the reversioner, and, subsequently, upon his appearing and consenting, made the declaration as asked, appointed a new trustee in the place of the company and the reversioner, and made a consequential vesting order. *In re* ALBERT ROAD, NORWOOD (NOS. 56 AND 58) – – – – **Peterson J. 289**

7. —— *Winding up—Preferential Payment—Insufficiency of Assets for Payment of Preferential Creditors—Costs and Expenses of Winding up—Rates—Sole Debenture-holder—Debenture creating Floating Charge—Priorities—Action against Debenture-holder to recover Contribution—Parties—Form of Order—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-ss.* 1 (*a*), 2 (*b*), 3.

By the Companies (Consolidation) Act, 1908, s. 209, sub-s. 1 (*a*), parochial or other local rates due from a company at the date of a winding up, and having become due and payable within twelve months next before that date, are (inter alia) made preferential debts. By sub-s. 2, "The foregoing debts shall— . . . . (*b*) In the

COMPANY—*continued.*
case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge." By sub-s. 3, "Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them":—

Held, that the effect of sub-s. 1 (*a*), sub-s. (2) (*b*), and sub-s. 3 of s. 209 was to make the costs and expenses of the winding up payable out of the assets not comprised in the debenture security before the payment of the preferential debts, but that if the general assets after the discharge of the costs and expenses of the winding up were insufficient for the payment of these preferential debts, then, to the extent to which they were insufficient, the amount must be made up by the debenture-holder whose security creates a floating charge upon the company's property out of the property comprised in or subject to that charge, or in other words, that whether a creditor was an unsecured creditor or a debenture-holder whose only security was that of a floating charge he was equally to be postponed in respect of any claim of his against the assets of the company until those preferential debts had been paid, but that the free general assets must be exhausted before recourse was had to the assets charged.

Where in a winding up the general assets are insufficient for the payment of the preferential creditors of the company, the proper plaintiff, in an action under s. 209 of the Act, to recover contribution from a debenture-holder with a floating charge towards payment of a preferential debt is the liquidator acting in the name of the company. WESTMINSTER CORPORATION AND UNITED TRAVELLERS CLUB COMPANY, LD *v.* CHAPMAN – – – – **Younger J. 161**

CONTEMPT OF COURT—*Landlord and Tenant—Trespass by Local Authority—Writ for Injunction by Tenant—Landlord's Request to Tenant to withdraw Writ—Threat to determine Tenancy.*

The yearly tenant of a cottage and land, adjoining a highway and forming part of a settled estate, issued a writ against the local authority for an injunction to restrain an alleged trespass on his land. The solicitor of the tenant for life of the estate wrote to the local authority with a view to arrange the matter, and at the same time wrote to the tenant that the tenant for life required him to withdraw the writ, and that, if he did not comply, his tenancy would be determined. On motion by the tenant to commit the solicitor for contempt of Court for sending him letters calculated to deter him from prosecuting the action and to prevent the administration of justice :—

Held, that the solicitor had not committed a contempt of Court. WEBSTER *v.* BAKEWELL R. D. C. – – – – **Neville J. 300**

CONTINGENT REMAINDER—Will—Class gift—Legal devise—Failure of particular estate—Preservation of entire remainder *See* WILL. 7. **116**

CONTRACT WHICH "OUGHT TO BE PERFORMED" WITHIN THE JURISDICTION—Writ—Service out of the jurisdiction—Separation deed – **251**
See SERVICE OUT OF THE JURISDICTION.

CONTRIBUTION — Company — Winding up — Action against debenture-holder to recover contribution – – **161**
See COMPANY. 7.

CONVERSION—Real estate – – **467, 493**
See WILL. 14, 15.

COPYRIGHT—*Infringement—Novel—Cinematograph Film—Burlesque—Immoral Tendency—Plaintiff's Right to maintain Action—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 7.

The plaintiff brought this action for the alleged infringement of her copyright in a novel by the sale and exhibition of burlesque cinematograph films, substantial parts of which were alleged to be reproductions of her novel. The plaintiff claimed an injunction, damages, or alternatively an account of profits, and the delivery up of all infringing films :—

Held, as a conclusion of fact, that the films did not constitute any infringement of the plaintiff's copyright in the novel.

The question of the possible infringement of copyright in a serious work by a burlesque or caricature considered.

Held, also, that the plaintiff's novel, being of a highly immoral tendency, was in any case disentitled to the protection of the Court, and that on this ground also the action failed.

Held, also, that the films themselves contained incidents of an indecently offensive character such as would have equally disentitled them to the protection of the Court, and that, inasmuch as the plaintiff in her action as framed was adopting and claiming the benefit derived from the films, on this ground also the action failed.

Action dismissed, but, under the circumstances, without costs to either party. GLYN *v.* WESTON FEATURE FILM CO. – **Younger J. 261**

COSTS—*Security—Plaintiff suing as Administrator—Administrator as Agent for Person out of the Jurisdiction.*

A plaintiff, who is an administrator, even although the letters of administration are only granted to him as the attorney of a person who is abroad and until that person obtains letters of administration, and although he is shown to be insolvent, will not be ordered to give security for the defendant's costs of the action.

Observations on *Greener* v. *E. Kahn & Co.* [1906] 2 K. B. 374 and *White* v. *Butt* [1909] 1 K. B. 50. RAINBOW *v.* KITTOE
Sargant J. 313

2. —— Will—Construction—Difficulty occasioned by language of testatrix – **272**
See WILL. 8.

CREDITORS—Company—Winding up.
See COMPANY.

DEBENTURE-HOLDERS AND DEBENTURES—Company.
See COMPANY.

DIRECTOR—Company – – – – 532
See COMPANY. 2.

DISSOLUTION—Company.
See COMPANY. 6.

DISTRIBUTION OF INTESTATES EFFECTS, STATUTES OF – – 493, 562
See WILL. 5, 15.

DOMICIL—French—French will – – 502
See SETTLEMENT. 2.

—— "Ordinarily resident" within the jurisdiction – – – – – 251
See SERVICE OUT OF THE JURISDICTION.

DONATIO MORTIS CAUSA—*Gift of Donor's own Promissory Note.*

A donor's own promissory note is not the subject of a donatio mortis causa. *In re* LEAPER. BLYTHE *v.* ATKINSON **Sargant J. 579**

DONEE—Appointment — General power of — British subject — French domicil — French will – – – – 502
See SETTLEMENT. 2.

DOWER—*Action for Assignment—Claim for Payment of Lump Sum to Doweress out of Purchase-moneys — Gavelkind — Charges on Realty in Respect of Estate Duty paid out of Personalty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2—*Real Estate Charges Act*, 1854 (*Locke King's Act*) (17 & 18 *Vict. c.* 113).

W. died intestate in 1902 whilst seised of lands of gavelkind tenure, and leaving a widow, C., who was entitled to the income of one half of the lands during widowhood for her dower, and an infant daughter, K., who was his heiress. Letters of administration of W.'s estate and also of K.'s estate (when she died in her infancy in 1913) were granted to C., who on W.'s death paid the estate duty on his realty out of his personalty, and therefore as to two thirds of the duty out of that to which K. was beneficially entitled and as to one third out of C.'s share. On the death of K. the defendants were the heirs of W. in respect of the gavelkind lands, which were sold :—

Held, that C. was not entitled against the wishes of the defendants to have a value set on her dower and to have the amount of the valuation paid out of the proceeds of sale of the lands.

In re Hall's Estate (1870) L. R. 9 Eq. 179 ; *Gleeson* v. *Byrne* (1890) 25 Ir. L. R. 361 ; and *Harrop* v. *Wilson* (1865) 34 Beav. 166 distinguished.

Held, also, following *In re Hole* [1906] 1 Ch. 673, that C. was not entitled to have the two thirds of the estate duty paid to her out of the proceeds of sale ; but that she was entitled in respect of the one third of the duty to a charge on K.'s real estate and to have it paid out of the proceeds of sale. *In re* WILSON. WILSON *v.* CLARK – – – – **Sargant J. 220**

EQUITABLE ESTATE — Remainder — Settlement – – – – – 467
See WILL. 14.

EQUITABLE LIMITATIONS—Will—Perpetuity—Rule in *Whitby* v. *Mitchell* – 467
See WILL. 14.

ESTATE DUTY.
See REVENUE.

EVIDENCE—Will—Extrinsic evidence **461, 518**
See WILL. 3, 16.

EXTRINSIC EVIDENCE – – **461, 518**
See WILL. 3, 16.

FINANCE ACTS.
See REVENUE.

FLOATING CHARGE.
See COMPANY.

FORECLOSURE ACTION—Mortgage – 452
See LIMITATIONS, STATUTES OF. 2.

FORFEITURE CLAUSE—Will—General clause applicable to both vested and contingent gifts—Alienation while gift contingent—Repugnancy – – – – 369
See WILL. 11.

FRAUD—Will—Settled estates—Appointment—Fraud — Promise enforced — Invalid appointment – – – – 142
See WILL. 18.

FRENCH DOMICIL—French will – – 502
See SETTLEMENT. 2.

FURNITURE—Will—Construction—Bequest—Furniture and all other articles of personal, domestic, or household use—"Carriages"—Motor car – – 172
See WILL. 2.

FUTURE—Decision of questions as to rights in
See ORIGINATING SUMMONS. 322

"FUTURE ESTATE OR INTEREST"—Mortgage—Lease of property prior to mortgage—Rent paid in advance – 452
See LIMITATIONS, STATUTES OF. 2.

GAVELKIND.
See DOWER.

"HONEST CONCURRENT USER."
See TRADE MARK.

HOTCHPOT—Will—Advances – – 480, 567
See WILL. 1, 17.

HUSBAND AND WIFE—*Judicial Separation—Alimony—Arrears due at Husband's Death—Liability of his Estate—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 17.

Where an order has been made against a husband for judicial separation and for payment of alimony, his widow may recover against his estate, if solvent, any arrears of alimony due at his death.

Quaere whether the arrears are recoverable if the husband's estate is insolvent. *In re* STILLWELL. BRODRICK *v.* STILLWELL
Sargant J. 365

IMPROVEMENTS—Settled land – – **404**
See SETTLED LAND.

INCLOSURE ACT—*Lords of the Manor—Commons and Wastes—Underlying Minerals—Compensation to Lords of Manor for "right to the soil"—Allotments in Fee Simple—Preamble—Distinction between "soil" and "mines and minerals"—Saving Clause—Whether Minerals reserved—Norton Inclosure Act*, 1814 (54 *Geo.* 3, *c. cxxxvi.*), *preamble; ss.* 12, 14, 17, 28, 32, 33, 66.

A special Inclosure Act, which incorporated the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), recited that the plaintiffs, as lords of the manor, were "owners of the soil of the commons and wastes within the manor, and of the mines and minerals therein," and directed that a certain portion of the commons and wastes should be allotted to the plaintiffs as lords of the manor as a full compensation for "their right to the soil of the said commons and wastes," and that the residue of the commons and wastes should be allotted to and amongst persons having right of common on the commons and wastes, and provided that all parties should hold their respective allotments in severalty freed and discharged from all rights of common; and by a saving clause the rights of all persons were saved except "the several persons, bodies politic and corporate, to whom any allotment or other compensation shall be made or provided by virtue of this Act, in respect of the interest or property for which such allotment or compensation shall be made," and except such other rights and interests as the inclosure thereby authorized required to be barred, destroyed, or extinguished. Excepting the preamble the Act and the award were silent as to mines and minerals:—

Held, that throughout the Act the word "soil" was used not in its widest sense, but in the restricted sense of the surface of the land, and that the allottees of the commons and wastes, other than the lords, took an estate in fee simple only in the surface of their allotments, the underlying mines and minerals being reserved to the lords.

Decision of Eve J., following that of Neville J. in *St. Catharine's College, Cambridge* v. *Greensmith* [1912] 2 Ch. 280, affirmed. MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* ROSSE – – – **C. A. 73**

INFANT—*Marriage Settlement — Repudiation after Eighteen Years—Reasonable Time—Reversionary Property—Repudiation before the Reversionary Property came into Possession—Infant's Ignorance of Right to repudiate.*

The "reasonable time" within which an infant must exercise her right to repudiate a settlement of reversionary property made by her on her marriage must be calculated from the time when she attains twenty-one, and not from the time when the reversionary property falls into possession and becomes payable to her or her trustees.

An infant cannot plead ignorance of her right to repudiate as an answer to her obligation to exercise that right within a reasonable time.

Decision of Neville J. affirmed.

In re Jones [1893] 2 Ch. 461 disapproved.

Carter v. *Silber* [1892] 2 Ch. 278 and *Edwards* v. *Carter* (same case in the House of Lords) [1893] A. C. 360 applied. CARNELL *v.* HARRISON – – – – – **C. A. 328**

INITIALS OF FIRM SPELT OUT—Registration—Discretion of Registrar—Letter marks—"Ogee"—Dictionary word – **436**
See TRADE MARK. 2.

INTEREST—Rate of—Will—Advances—Hotchpot—Division of income till distribution—Advanced legatee charged with interest – – – – – **480**
See WILL. 1.

"INTESTATE PERSONS, STATUTE FOR THE DISTRIBUTION OF THE ESTATES OF"—Real estate – – **493, 562**
See WILL. 5, 15.

ISOLATION HOSPITAL—Hospital committee——Control by county council—Power of council to vary representation of constituent local authorities – – **177**
See LOCAL GOVERNMENT.

ISSUE.
See WILL. 19.

JOINT TENANCY—Tenancy in common or—Advancement clause — Class taking original share by substitution – **97**
See WILL. 4.

JURISDICTION—Person out of the—Plaintiff suing as administrator—Administrator as agent for—Costs—Security – **313**
See COSTS.

—— Service out of the—Writ – – – **251**
See SERVICE OUT OF THE JURISDICTION.

LAND TRANSFER — Will — Contingent remainder — Class gift—Legal devise—Failure of particular estate—Preservation of entire remainder – – **116**
See WILL. 7.

LANDLORD AND TENANT—Trespass by local authority — Writ for injunction by tenant—Landlord's request to tenant to withdraw writ—Threat to determine tenancy—Contempt of Court – **300**
See CONTEMPT OF COURT.

LAPSE BY DEATH OF "LEGATEE," PROVISION AGAINST—Whether applicable to residuary legatee—Bequest by codicil
See WILL. 12. 523

LEASE—Company—Assignment—Dissolution of company.
See COMPANY.

—— Mortgage—Rent paid in advance – 452
See LIMITATIONS, STATUTES OF. 2.

—— Surrender—Grant of new lease for longer term at increased rent – – 279
See TENANT FOR LIFE AND REMAINDERMAN. 2.

LEGACY DUTY.
See REVENUE.

LEGATEE.
See WILL.

LIFE ASSURANCE SOCIETY—Income tax 228
See REVENUE. 1.

LIMITATIONS, STATUTES OF—*Administration—Deficiency of Personalty to pay Testator's Debts—Payment by Sole Executrix out of her own Moneys — Right to be recouped out of Testator's Real Estate—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10.

Testator died in 1885, and by his will appointed his wife E. and W. and H. executors. After certain specific and pecuniary bequests he gave the residue of his personal estate to E., W., and H., upon trust for sale, and, after payment of his debts and funeral and testamentary expenses, to invest the net proceeds and pay the income to E. for life, and after her death to hold the investments and income upon trusts thereinafter declared as to the same. He then devised his real estate unto and to the use of E. for life, and after her death he devised it to W. and H., upon trust for sale, and to hold the net proceeds, and (after E.'s death) the proceeds of the residuary personalty, in trust to pay some annuities, and subject thereto in trust for certain collateral relations. By his first codicil the testator removed W. from the executorship and trusteeship during E.'s lifetime, and by a second codicil he revoked the devise to her for life of so much of his real estate as related to Stainton's Close, which he devised to H. and E., upon trust for sale and to hold the net proceeds upon the trusts declared by the will concerning his residuary personalty. H. having renounced probate and disclaimed the trusts, E. became the sole executrix and trustee, and, as the personalty was insufficient to pay the testator's debts, she paid them out of her own moneys to the extent of 975*l.* As tenant for life she sold part of the realty, but the purchase-moneys were absorbed by payment off of mortgages, and she did not exercise the trust for sale of the other realty, or take any steps to obtain payment of the 975*l.* out of the realty. After her death in 1915 the trustees of the will and the separate trustees of Stainton's Close sold both that property and the other realty, and the trustees of the will raised the question whether E.'s estate was entitled to

LIMITATIONS, STATUTES OF—*continued.*
be recouped the 975*l.* out of the proceeds of sale of the realty, or, alternatively, out of the proceeds of sale of Stainton's Close :—

Held, as to the realty other than Stainton's Close, that even if E. had the right to receive the money as executrix, then, having regard to s. 8 of the Real Property Limitation Act, 1874, she had "the present right to receive" the 975*l.*, and could, in an action for administration of the real estate, have recovered the amount, the persons to pay being all the persons entitled to the real estate; and, as to Stainton's Close, that E. was in no better a position than the creditors were before their debts were paid, and their claims would have been barred by s. 10 of the Act; and, therefore, that the claim of E.'s executor was statute-barred.

Burrell v. *Earl of Egremont* (1843) 7 Beav. 205 distinguished. *In re* WELCH. MITCHELL *v.* WILLDERS – – – **Sargant J. 375**

2. —— *Mortgage—Foreclosure Action—Date of Accruer of Right to bring Action—"Other future estate or interest"—Lease of Property prior to Mortgage — Rent paid in advance—Receiver—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2, 8.

In 1897 freehold property was mortgaged in fee simple to secure certain moneys payable on demand, but there was no covenant by the mortgagor for payment. At the date of the mortgage the property was subject to a lease for twenty-one years from July 29, 1896. The yearly rent of 50*l.* had been paid in advance for seventeen and a half years upon the execution of the lease, and no quarter's rent became due until January 29, 1904. After July, 1903, no payment was made or acknowledgment given in respect of the mortgage. On January 15, 1916, the mortgagees commenced foreclosure proceedings :—

Held, reversing the decision of Eve J., that the estate claimed by the mortgagees was not "an estate or interest in reversion or remainder, or other future estate or interest," within the meaning of those terms as used in s. 3 of the Real Property Limitation Act, 1833, but was a present estate in fee simple, and none the less an estate in possession because it was subject to an occupation lease; that the mortgagees' right to bring an action first accrued immediately upon the execution of the mortgage; and that, as more than twelve years had elapsed since the last acknowledgment, their right of action was barred.

Inasmuch as the object of a foreclosure action is not to obtain the payment of rent but to deprive the mortgagor of his right to redeem, the fact that the mortgagee will not by bringing his action derive any immediate pecuniary benefit from the rents and profits—because, for instance, the rent is a peppercorn or has been paid in advance—will not prevent time from running under the statute.

Samuel Johnson & Sons v. *Brock* [1907] 2 Ch. 533 approved. WAKEFIELD AND BARNSLEY UNION BANK, LD. *v.* YATES – – **C. A. 452**

LOCAL GOVERNMENT — *Isolation Hospital — Hospital Committee—Control by County Council — Power of Council to vary Representation of Constituent Local Authorities — Isolation Hospitals Act*, 1893 (56 & 57 *Vict. c.* 68), *ss.* 9, 10, 18, 20—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 32, *sub-s.* 3.

In 1897 the defendant council, acting under the provisions of the Isolation Hospitals Act, 1893, made an order constituting a hospital district, directing an isolation hospital for that district to be established, and determining the proportions in which the several constituent local authorities (including the relator plaintiff council) were to contribute to the expenses. The same order provided for the formation of a hospital committee, and gave directions as to the number of the committee and of the representatives thereon of each of the constituent local authorities and of the defendants (the relator plaintiffs having one representative and the defendants two), and as to a number of matters relating to the election, rotation, and qualification of members, and other details.

The committee thus constituted discharged their duties until 1914, when differences arose between them and the defendants on questions of policy, and on January 22, 1914, the defendants, claiming to act under the powers conferred by s. 32, sub-s. 3, of the Interpretation Act, 1889, made a further order directing that in lieu of the scheme of representation adopted in the order of 1897 there should in future be a fresh scheme under which the defendants' representatives, thereby increased to nine, would have an absolute majority on the committee and be able to control its policy. The relator plaintiffs objected to this alteration, which (inter alia) reduced their representation on the committee, allowing them only one representative jointly with another constituent local authority, and they commenced this action to test the validity of the order of 1914.

Sargant J. held that the order of 1914 was ultra vires and invalid :—

Held by Bankes L.J. and Warrington L.J. (Lord Cozens-Hardy M.R. dissenting), that upon the true construction of the Isolation Hospitals Act, 1893, the hospital committee was not intended to be independent of the county council; that s. 32, sub-s. 3, of the Interpretation Act, 1889, applied; that the defendants had acted within their statutory powers in making the order of 1914; and that that order was valid.

Decision of Sargant J. reversed. ATT.-GEN. *v.* DERBYSHIRE C. C. – – – **C. A. 177**

MANOR—Inclosure Act—Lords of the manor—Commons and wastes — Underlying minerals – – – – – **73**
See INCLOSURE ACT.

MARRIAGE SETTLEMENT—Infant—Repudiation. – – – – – – **328**
See INFANT.

MINES—Inclosure Act—Lords of the manor—Commons and wastes — Underlying minerals – – – – – **73**
See INCLOSURE ACT.

MISDESCRIPTION OF LEGATEE—Parol extrinsic evidence – – – **461**
See WILL. 3.

"MONEY" — Residuary personal estate—Admissibility of extrinsic evidence – **518**
See WILL. 16.

MORTGAGE—Company—Receiver and manager—Business—Specific business premises—Present and future chattels thereon—Right to use chattels—Construction—Floating charge on chattels—Rates—Priority – – – – – **132**
See COMPANY. 3.

2. —— Foreclosure action—Date of accruer of right to bring action – – **452**
See LIMITATIONS, STATUTES OF. 2.

3. —— Leases to company.
See COMPANY. 6.

4. —— *Shares in Limited Company—Voting Powers retained by Mortgagor — Mandatory Injunction against Mortgagee.*

A mandatory injunction will be granted to enforce an agreement by the mortgagee of shares in a limited company to vote in accordance with the wishes of the mortgagor. PUDDEPHATT *v.* LEITH – – – – **Sargant J. 200**

MORTMAIN AND CHARITABLE USES ACTS, 1888 and 1891.
See CHARITY.

MOTOR CAR—Will — Construction—Bequest—Furniture and all other articles of personal, domestic, or household use—"Carriages"—Motor car – – **172**
See WILL. 2.

NORTON INCLOSURE ACT, 1814 – – **73**
See INCLOSURE ACT.

NOVEL — Cinematograph film — Burlesque — Immoral tendency — Copyright — Infringement—Plaintiff's right to maintain action – – – – **261**
See COPYRIGHT.

ORIGINATING SUMMONS—*Decision of Questions as to Rights in Future—Rules of the Supreme Court*, 1883, *Order XXV., r.* 5; *Order LIV.A.*

Notwithstanding Order XXV., r. 5, and Order LIV.A of the Rules of the Supreme Court, 1883, the rule laid down by Jessel M.R. in *Curtis* v. *Sheffield* (1882) 21 Ch. D. 1—that it is the practice of the Court not to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decision, or there are other special circumstances to satisfy the Court that it is desirable at once to decide on the future rights, or all the parties who in any event will be entitled to the property are of age and are ready to argue the case—is generally applicable at the present time.

By a will freehold property was devised to M. for life "and after her death to her children and their issue, per stirpes and not per capita, in equal shares as tenants in common." There was

ORIGINATING SUMMONS—*continued.*
a similar devise to T. for life and after his death to his children and their issue. M. had five children, all of whom had attained twenty-one. T. had two sons (both over twenty-one), and the sons had between them three infant children. An originating summons by two of M.'s children and T.'s two sons against M., T., and the infant grandchildren raising the questions whether under the devises in remainder the children of M. and T. respectively who were or might be entitled to share in the properties were entitled for estates in tail as tenants in common, and, if not, what class or classes of persons would, on the death of M. and T. respectively, be entitled :—

Held, that the Court ought not, in its discretion, to decide the questions raised while the interests of the children and issue were still in remainder, but that the summons must stand over, with liberty to amend, as it was intimated that the children might desire an opportunity of executing disentailing assurances and applying to obtain payment of the proceeds of sale of part of the property which had been sold. *In re* STAPLES. OWEN *v.* OWEN – **Sargant J. 322**

PARENT.
See WILL. 19.

PERPETUITY — Will — Personalty settled by reference to realty—Adult tenant in tail in possession—Construction – **91**
See WILL. 13.

—— Will—Rule in *Whitby* v. *Mitchell* – **467**
See WILL. 14.

PERSONALTY — Will — Perpetuity—Personalty settled by reference to realty—Adult tenant in tail in possession—Construction – – – – – – **91**
See WILL. 13.

PETITION—Service.
See COMPANY. 6.

PORTIONS — Settlement — Trustees of term—Power to postpone raising—"Reasonable means"—Duty to have regard to interests of estate generally – **511**
See SETTLEMENT. 4.

POWER OF APPOINTMENT—*Limited Power—Appointment to Trustees for Objects—Settlement on Objects—Transfer of Fund.*

A testator directed his trustees to set apart and invest a certain fund in their own names and to stand possessed thereof upon trust to pay the income to his niece for life and after her decease to stand possessed thereof upon trust for her children and grandchildren at such ages or times and "in such shares and manner" as she should appoint.

The niece appointed that her uncle's trustees should after her death assign, convey, and make over the fund to the trustees of her own will to hold upon certain trusts in settlement on her daughters and their children :—

Held, that, though the appointment was good as to the beneficial interests, the original

POWER OF APPOINTMENT—*continued.*
trustees must continue to hold and administer the fund.

Busk v. *Aldam* (1874) L. R. 19 Eq. 16 ; *Scotney* v. *Lomer* (1886) 31 Ch. D. 380, 386 ; and *In re Tyssen* [1894] 1 Ch. 56 followed.

In re Redgate [1903] 1 Ch. 356 and *In re Adams' Trustees' and Frost's Contract* [1907] 1 Ch. 695 distinguished. *In re* MACKENZIE. BAIN *v.* MACKENZIE – – **Astbury J. 125**

POWER OF APPOINTMENT, TESTAMENTARY.
See WILL and SETTLEMENT.

PRACTICE.
See ORIGINATING SUMMONS, SERVICE OUT OF THE JURISDICTION, and WILL.

PREFERENTIAL PAYMENTS — Company — Winding up – – – – **161**
See COMPANY. 7.

PRIORITY—Company – – – – **132**
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PROMISSORY NOTE – – – – **579**
See DONATIO MORTIS CAUSA.

RATES—Company—Priority – – – **132**
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REAL ESTATE—Conversion – – **467, 493**
See WILL. 14, 15.

REAL PROPERTY LIMITATION ACTS – **452**
See LIMITATIONS, STATUTES OF. 2.

RECEIVER AND MANAGER—Company.
See COMPANY.

RECREATION GROUNDS ACT, 1859 – **100**
See CHARITY.

REGISTER—Rectification.
See TRADE MARK. 1.

REGISTRATION — Combination of letters — Surname spelt backwards—Invented word – – – – – **422**
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REMAINDER, OR EXPECTANCY, EQUITABLE ESTATE IN – – – – **467**
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RENT PAID IN ADVANCE—Mortgage—Foreclosure – – – – – **452**
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REPUDIATION—Infant—Marriage settlement
See INFANT. **328**

REPUGNANCY—Will – – – – **369**
See WILL. 11.

RESIDUARY PERSONAL ESTATE — Will — "Money"—Admissibility of extrinsic evidence – – – – – **518**
See WILL. 16.

RESIDUE – – – – – **518, 567**
See WILL. 16, 17.

REVENUE — *Income Tax — Life Assurance Society—Taxation on Profit or Income Basis—Annual Option of Taxing Authority—Agreement exercising Option for next Five Years—Validity—Declaratory Order—Joinder of Board of Inland Revenue—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Cases* 1, 3, 4, 5—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *ss.* 2, 5—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 57—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *s.* 1.

A life assurance society, having been assessed for income tax on an income basis for the financial year 1914-15, brought an action against the Attorney-General and the Board of Inland Revenue, alleging that by an agreement of 1912 the surveyor of taxes, acting on behalf of the Board, had agreed to assess them for the five years 1911-12 to 1915-16 (*a*) on a profit basis and (*b*) at an agreed figure of profit based on the previous quinquennial valuation, and asking for a declaration that the agreement was binding, and an injunction to restrain the Board from enforcing the recent assessment:—

Held, that if the agreement had borne the construction alleged by the society (which the Court did not accept) it would have been invalid, as the income tax was an annual tax imposed and assessed year by year, and neither the surveyor nor the Board could bind the Crown as to the basis or amount of assessment in future years.

Whether, having regard to the society's right of appeal to the General Commissioners under the Taxes Management Act, 1880, s. 57, it would have been right to make a declaratory order against the Attorney-General, *quaere*.

Whether, having regard to their functions under the Inland Revenue Regulation Act, 1890, s. 1, the Board were competent parties to an action of this nature, *quaere*. GRESHAM LIFE ASSURANCE SOCIETY *v.* ATT.-GEN.
Astbury J. 228

2. —— *Settlement Estate Duty—Estate Duty—Allowance for Settlement Estate Duty already paid—Apportionment between Persons interested in Estate—Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

The amount of settlement estate duty allowed off the estate duty payable under s. 14 of the Finance Act, 1914, on the first occasion on which it becomes payable enures for the benefit of the several persons interested in the property in respect of which such estate duty is paid.

A testator, who died in 1913, by his will settled his residuary estate upon trust for A. for life, and then for other persons subject to the payment out of the income of a life annuity commencing on A.'s death. A. died in October, 1914, after the Finance Act, 1914, came into operation:—

Held, that the amount of settlement estate duty paid on the testator's death, which (pursuant to s. 14 (*b*) of the Act) was allowed off the estate duty payable on A.'s death, reduced the amount of estate duty for the benefit of the annuitant as well as of the residuary legatees.

Held, also, that the interest receivable under s. 14 (*b*) on the said amount of settlement estate duty for the period between August 15, 1914, and A.'s death belonged to A.'s representatives.

Held, further, that on the death of an annuitant, to whom an immediate annuity payable out of the income of the residuary estate was given by a codicil to the said will, the interest receivable under s. 14 (*b*) for the period between August 15, 1914, and the death of the annuitant on the amount of settlement estate duty paid in respect of the slice of the estate representing such annuity will belong to the annuitant's representatives. *In re* BOOTH. PLEACE *v.* BOOTH — — — — **Younger J. 349**

3. —— Will — Settlement estate duty — Legacy duty — — — — **153**
See WILL. 9.

REVERSION — Lease — Trustee — Company — Dissolution — — — — **289**
See COMPANY. 6.

REVOCATION—Appointment — — — **552**
See SETTLEMENT. 6.

RULES OF THE SUPREME COURT. Order XI., r. 1 (c) and (e): DREXEL *v.* DREXEL [1916] **1 Ch. 251**

—— —— **Order XXV., r. 5; Order LIV.A**: *In re* STAPLES. OWEN *v.* OWEN [1916] **1 Ch. 322**

—— —— **Order LV. (Chambers — Chancery), r. 64**: *In re* COOKE. RANDALL *v.* COOKE — — — [1916] **1 Ch. 480**

—— —— **Order LXV., r. 14B**: *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER [1916] **1 Ch. 272**

SECURITY FOR COSTS—Plaintiff suing as administrator—Administrator as agent for person out of the jurisdiction — **313**
See COSTS.

SEPARATION DEED — Covenant to pay a separate allowance—Writ—Service out of the jurisdiction—Domicil — **251**
See SERVICE OUT OF THE JURISDICTION.

SERVICE OUT OF THE JURISDICTION—*Writ—Separation Deed—Covenant to pay a Separate Allowance — Domicil — "Ordinarily resident" within the Jurisdiction—Contract which "ought to be performed" within the Jurisdiction—Rules of the Supreme Court, Order XI., r. 1 (c) and (e).*

D. and his wife, Americans by origin, in 1897 came with their family to England, made it their permanent home, and acquired an English domicil. D. was connected with a banking business in America and in Paris. In January, 1913, they entered into a deed of separation, prepared in America by American lawyers and executed by D. in America and by his wife in England, by which they agreed to live apart, and D. covenanted (amongst other things) to pay his wife an allowance of 50,000 dollars per annum, but no place for payment was stated. They continued to reside in England, each having a separate establishment, but in June,

SERVICE OUT OF THE JURISDICTION—*continued.*

1915, D. closed his establishment in England and went to Paris intending to acquire a French domicil and to institute divorce proceedings in the French Courts so as to get rid of the separation deed. In July, 1915, the wife issued a writ against D. to enforce the provisions of the separation deed, and obtained leave under Order XI., r. 1 (*c*), to serve the writ on him in Paris on the ground that he was ordinarily resident in England. He entered a conditional appearance and moved to discharge the service of the writ upon him, alleging (1.) that he was not domiciled or ordinarily resident in England at the date of the issue of the writ, and (2.) that there had been no breach by him of any contract in the separation deed that came within r. 1 (*e*) of the Order :—

Held, on the evidence, that D. was not domiciled or ordinarily resident in England at the date of the issue of the writ.

But *held*, that his covenant to pay the allowance was a contract which came within r. 1 (*e*) for the breach of which the wife was entitled to sue in England, and therefore that his application failed. DREXEL *v.* DREXEL **Neville J. 251**

SETTLED ESTATE — Will — Appointment — Fraud — Promise enforced — Invalid appointment – – – – **142**
See WILL. 18.

SETTLED LAND — *Capital Money — Improvements—Income or Capital chargeable — Infant Tenant in Tail—Exercise of Powers by Trustees of Settlement—Duties of Trustees—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 53, 56, 59, 60.

Testator by his will, made before but coming into operation after the Settled Land Act, 1882, empowered his trustees to pay the expenses of insurance, repairs, and other outgoings, and of care, management, cultivation, and improvements out of the income of his settled estate :—

Held, that the power was confined to improvements of a recurring character and did not extend to improvements authorized by the Settled Land Acts.

Walpole v. *Boughton* (1850) 12 Beav. 622 followed.

Where during the minority of a tenant in tail trustees of the settlement execute improvements authorized by the Settled Land Acts, which under a special power contained in the settlement may be paid for out of income, they must not necessarily charge the expenses of such improvements being of a permanent character against income to the injury of the other persons interested under the settlement, merely because, owing to the interest of the infant tenant in tail in the income being cut down to an annuity, it may be to his advantage to have them raised out of surplus income. *In re* STAMFORD AND WARRINGTON (EARL). PAYNE *v.* GREY **Younger J. 404**

—— Tenant for life and remainderman—Lease —Surrender—Capital and income **279**
See TENANT FOR LIFE AND REMAINDERMAN. 2.

SETTLEMENT—Equitable estate in remainder or expectancy — Rule in *Whitby* v. *Mitchell* – – – – – **467**
See WILL. 14.

2. —— *General Power of Appointment — Donee British Subject—French Domicil—French Will — General Bequest — Power exercised—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 1, 9, 10, 27—*Wills Act*, 1861 (24 *&* 25 *Vict. c.* 114), *s.* 1.

A British subject died domiciled in France leaving an unattested holograph will in French by which she gave the usufruct of "all the property and rights whatsoever" comprised in her estate to A. for life, with a gift over on A.'s death of "the ownership" of the said property and rights, and wholly cancelled "any testamentary or other disposition" theretofore made by her. The will was valid by French law and was admitted to probate in England :—

Held, that the will effectually exercised a general testamentary power of appointment which the testatrix had over the trust funds of an English settlement.

D'Huart v. *Harkness* (1865) 34 Beav. 324 approved and followed.

The dictum of Kay J. in *In re Kirwan's Trusts* (1883) 25 Ch. D. 373 followed by Kekewich J. in *Hummel* v. *Hummel* [1898] 1 Ch. 642, to the effect that the will of a British subject domiciled abroad, being a valid will by the law of the domicil and admitted to probate in England, must comply with the formalities required by ss. 9 and 10 of the Wills Act, 1837, in order to exercise a general testamentary power of appointment in an English settlement, dissented from. *In re* SIMPSON. COUTTS & CO. *v.* CHURCH MISSIONARY SOCIETY – **Neville J. 502**

3. —— Marriage—Infant—Repudiation **328**
See INFANT.

4. —— *Portions—Trustees of Term—Power to postpone raising—"Reasonable Means"—Duty to have regard to Interests of Estate generally.*

Trustees of a term for raising portions by sale or mortgage or by "any other reasonable means," with power in their discretion to postpone the raising of the same, are bound to take into account the interests of the persons entitled to the estate as well as the interests of the portioners.

Testator, in exercise of a power contained in a settlement to appoint portions to the amount of 25,000*l.*, appointed the estate to trustees for a term of 1000 years on trust upon the death of a tenant for life, who died in 1915, to raise the portions by mortgage or sale of the hereditaments, or by receipt of the income thereof, or by sale of timber or minerals, or by any other reasonable means, with power in their discretion to postpone the raising of the same. The trustees of the term found that the only practicable way of raising the portions immediately was by mortgage at the rate of 6*l.* per cent. The total value of the estate and capital moneys was estimated at some 174,000*l.* The present tenant for life objected to the immediate raising of the portions and offered to increase the rate of interest on the portions from 4*l.* to 5*l.* per cent. as a condition of postponing the raising of the

SETTLEMENT—*continued.*

portions. On a summons for directions taken out by the trustees of the term :—

Held, that the trustees of the term ought to have regard to the interests of the persons entitled to the estate as well as to the interests of the portioners, and under the circumstances the Court gave liberty to the trustees to postpone the raising of the portions for the period of one year if and so long as the tenant for life paid the increased rate of interest, with liberty to apply at the end of the year. *In re* SANDYS. UNION OF LONDON AND SMITHS BANK *v.* LITCHFIELD – – – – **Sargant J. 511**

5. —— *Power to appoint New Trustees—Subsidiary Settlement—Power imported by Reference —Appointment of New Trustees — Event not specified in Power—Invalid Appointment—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 10, 25, 35.

In 1882 life policies were by deed assigned to the trustees of an 1877 settlement to hold upon the same trusts and with, under, and subject to the same powers, provisoes, agreements, and declarations as in the 1877 settlement contained. That settlement contained a power to appoint new trustees in the event (amongst others) of a trustee becoming incapable to act, but did not include the event of a trustee being unfit to act. This latter event is one of those specified in sub-s. 1 of s. 10 of the Trustee Act, 1893, which is a retrospective enactment.

In July, 1914, F. C. and O. S. were the trustees of both settlements, and subsequently the donees of the power in the 1877 settlement executed a deed whereby, after reciting that F. C. had become incapable and O. S. by reason of his breaches of trust was unfit to act, they, in exercise of that power, appointed two persons to be trustees of both settlements in the place of F. C. and O. S. :—

Held, that the power of appointing new trustees in the 1877 settlement was by reference imported into the settlement of 1882.

But *held*, on the authority of *In re Wheeler and De Rochow* [1896] 1 Ch. 315, that the donees of the power were restricted to the particular events specified in the power, and therefore that the appointment was bad, and new trustees were appointed by the Court.

The decision of Kekewich J. in *In re Wheeler and De Rochow* (supra) disapproved of, but followed as it has been treated as an authority since 1896. *In re* SICHEL'S SETTLEMENTS. SICHEL *v.* SICHEL – – – – **Neville J. 358**

6. —— *Testamentary Power of Appointment —Appointment by Will—Revocation and New Appointment by Codicil upon Invalid Trusts—Original Appointment operative.*

A testatrix had under her marriage settlement a testamentary power to appoint the settled funds to all or any of her three sons and six daughters, all of whom attained the age of twenty-one years. By her will she appointed the funds to her six daughters in equal shares absolutely. By a codicil to her will, after reciting the appointment to her daughters and her desire that the share of her daughter M. should not be paid to her but should be held upon the trusts for her benefit thereinafter declared, the testatrix revoked the said appointment "in so far (but no farther) as the same" gave to M. an absolute interest therein, and appointed the share which M. "would have been entitled to but for these presents" to trustees upon absolute discretionary trusts for her for life, with a gift over after her death to her sisters, which trusts offended the rule against perpetuities and were void :—

Held, that the share appointed to M. by the will was not wholly revoked by the codicil and did not, on failure of the trusts of the codicil, go as in default of appointment under the settlement ; but that, the trusts of the codicil being void, the original appointment to M. by the will remained operative. *In re* BERNARD'S SETTLEMENT. BERNARD *v.* JONES – **Neville J. 552**

SETTLEMENT ESTATE DUTY.
See REVENUE.

"SOIL"—Inclosure Act—Compensation to lords of manor for "right to the soil" – **73**
See INCLOSURE ACT.

STATUTE FOR THE DISTRIBUTION OF THE ESTATES OF INTESTATE PERSONS
See WILL. **493, 562**

STATUTES:—

1814.

54 Geo. 3, c. cxxxvi. (Norton Inclosure), preamble ; ss. 12, 14, 17, 28, 32, 33, 66 : ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* ROSSE **C. A. [1916] 1 Ch. 73**

1833.

3 & 4 Will. 4, c. 27 (Real Property Limitation), s. 3 : WAKEFIELD AND BARNSLEY UNION BANK, LD. *v.* YATES **C. A. [1916] 1 Ch. 452**

1837.

1 Vict. c. 26 (Wills), ss. 1, 9, 10, 27 : *In re* SIMPSON. COUTTS & CO. *v.* CHURCH MISSIONARY SOCIETY **[1916] 1 Ch. 502**

1842.

5 & 6 Vict. c. 35 (Income Tax), s. 100, Sched. D, Cases 1, 3, 4, 5 : GRESHAM LIFE ASSURANCE SOCIETY *v.* ATT.-GEN. **[1916] 1 Ch. 228**

1853.

16 & 17 Vict. c. 34 (Income Tax), ss. 2, 5 : GRESHAM LIFE ASSURANCE SOCIETY *v.* ATT.-GEN. – – **[1916] 1 Ch. 228**

1857.

20 & 21 Vict. c. 85 (Matrimonial Causes), s. 17 : *In re* STILLWELL. BRODRICK *v.* STILLWELL – – **[1916] 1 Ch. 365**

1859.

22 Vict. c. 27 (Recreation Grounds) : *In re* VERRALL – – **[1916] 1 Ch. 100**

STATUTES—*continued.*

1861.

24 & 25 Vict. c. 114 (Wills), s. 1: *In re* SIMPSON. COUTTS & CO. *v.* CHURCH MISSIONARY SOCIETY [1916] 1 Ch. 502

1874.

37 & 38 Vict. c. 57 (Real Property Limitation), ss. 1, 2, 8: WAKEFIELD AND BARNSLEY UNION BANK, LD. *v.* YATES C. A. [1916] 1 Ch. 452

—— —— ss. 8, 10: *In re* WELCH. MITCHELL *v.* WILLDERS – – [1916] 1 Ch. 375

1880.

43 & 44 Vict. c. 19 (Taxes Management), s. 57: GRESHAM LIFE ASSURANCE SOCIETY *v.* ATT.-GEN. – [1916] 1 Ch. 228

1882.

45 & 46 Vict. c. 38 (Settled Land), s. 6 (i.); s. 7, sub-ss. 1, 2; s. 8, sub-s. 1; s. 13, sub-ss. 1, 5, 6: *In re* WIX. HARDY *v.* LEMON – – – [1916] 1 Ch. 279

—— —— ss. 53, 56, 59, 60: *In re* STAMFORD AND WARRINGTON (EARL). PAYNE *v.* GREY – – – [1916] 1 Ch. 404

1888.

51 & 52 Vict. c. 42 (Mortmain and Charitable Uses): *In re* VERRALL [1916] 1 Ch. 100

1889.

52 & 53 Vict. c. 63 (Interpretation), s. 32, sub-s. 3: ATT.-GEN. *v.* DERBYSHIRE C. C. – – – [1916] 1 Ch. 177

1890.

53 & 54 Vict. c. 21 (Inland Revenue Regulation), s. 1: GRESHAM LIFE ASSURANCE SOCIETY *v.* ATT.-GEN. [1916] 1 Ch. 228

1891.

54 & 55 Vict. c. 73 (Mortmain and Charitable Uses): *In re* VERRALL [1916] 1 Ch. 100

1893.

56 & 57 Vict. c. 53 (Trustee), ss. 10, 25, 35: *In re* SICHEL'S SETTLEMENTS. SICHEL *v.* SICHEL – – [1916] 1 Ch. 358

—— —— s. 25, sub-s. 1, and s. 26: *In re* ALBERT ROAD, NORWOOD (NOS. 56 AND 58) – – – [1916] 1 Ch. 289

56 & 57 Vict. c. 68 (Isolation Hospitals), ss. 9, 10, 18, 20: ATT.-GEN. *v.* DERBYSHIRE C. C. – – – [1916] 1 Ch. 177

1894.

57 & 58 Vict. c. 30 (Finance), s. 5: *In re* WALLER – – [1916] 1 Ch. 153

—— —— s. 6, sub-s. 2: *In re* WILSON. WILSON *v.* CLARK – [1916] 1 Ch. 220

STATUTES—*continued.*

1896.

59 & 60 Vict. c. 28 (Finance), s. 19: *In re* WALLER – – [1916] 1 Ch. 153

1897.

60 & 61 Vict. c. 65 (Land Transfer), ss. 1, 2, 3; *In re* ROBSON – [1916] 1 Ch. 116

1905.

5 Edw. 7, c. 15 (Trade Marks), ss. 9, 11: *In re* GEO. CORDING, LD.'S APPLICATION C. A. [1916] 1 Ch. 422

—— —— ss. 9, 11, 12, 19; *In re* GARRETT'S APPLICATION – C. A. [1916] 1 Ch. 436

—— —— ss. 11, 19, 21: *In re* MAEDER'S TRADE MARK APPLICATION [1916] 1 Ch. 304

—— —— ss. 11, 41: J. WIGFULL & SONS, LD. *v.* J. JACKSON & SON, LD. [1916] 1 Ch. 213

1908.

8 Edw. 7, c. 69 (Companies (Consolidation)), ss. 107, 209: NATIONAL PROVINCIAL BANK OF ENGLAND *v.* UNITED ELECTRIC THEATRES, LD. – [1916] 1 Ch. 132

—— —— s. 209, sub-ss. 1 (*a*), 2 (*b*), 3: WESTMINSTER CORPORATION AND UNITED TRAVELLERS CLUB CO. *v.* CHAPMAN [1916] 1 Ch. 161

1910.

10 Edw. 7, c. 8 (Finance (1909-10)), s. 58, sub-ss. 2, 4: *In re* WALLER [1916] 1 Ch. 153

1911.

1 & 2 Geo. 5, c. 46 (Copyright), ss. 1, 7: GLYN *v.* WESTON FEATURE FILM CO. [1916] 1 Ch. 261

1914.

4 & 5 Geo. 5, c. 10 (Finance), s. 14: *In re* BOOTH. PLEACE *v.* BOOTH [1916] 1 Ch. 349

—— —— s. 14: *In re* PALMER. PALMER *v.* PALMER – – [1916] 1 Ch. 395

SUBSTITUTION — Class — Joint tenancy or tenancy in common — Advancement clause—Class taking original share by substitution – – – – 97
See WILL. 4.

SURNAME SPELT BACKWARDS—Registration — Combination of letters — Invented word – – – – – 422
See TRADE MARK. 1.

TENANCY IN COMMON — Will — Class — Joint tenancy or tenancy in common—Advancement clause—Class taking original share by substitution – – – 97
See WILL. 4.

TENANT FOR LIFE AND REMAINDERMAN —*Company—Reserve Fund—Exchange of Shares for Shares in New Company—Distribution of Reserve Fund by way of Dividend.*

The Cambrian, a working colliery company, had accumulated out of profits a large reserve fund invested in the shares of a trust company, which also held shares in three other working colliery companies. In 1913 a combine company was incorporated for the purpose of acquiring the shares in all four working companies, the shareholders in which were offered the opportunity of exchanging their shares for shares in the Combine on advantageous terms, and practically the whole of the shareholders availed themselves of the offer and deposited their shares under a provisional agreement by which provision was made for the deposit in a bank of the share certificates in the four working companies and for the allotment in exchange of shares in the Combine. The annexed scheme set out the rate of exchange in the case of each of the four working companies, and under the heading dealing with the Cambrian added a note that the Cambrian's assets in the Trust Company (referring to the reserve fund) would be distributed among the Cambrian's ordinary shareholders. Immediately after the adoption of the provisional agreement the directors of the Trust Company exchanged all shares held by that company in the three other working companies for shares in the Combine, and subsequently went into liquidation. Other steps were taken, and a resolution was passed by the Cambrian for the distribution of the assets to be received by the Cambrian in the liquidation of the Trust Company, representing the reserve fund, by way of dividend amongst their ordinary shareholders. As the result of these transactions the shares in the Combine thus acquired by the Cambrian and some cash were distributed among their ordinary shareholders. On a summons taken out by trustees raising the question whether the shares and cash so distributed to them ought as between tenant for life and remaindermen to be treated as capital or income :—

Held, that the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend and not by way of reduction of capital; that, looking at the real transaction, there was no intention to capitalize the reserve fund; and that the shares and cash in the hands of the trustees must be treated as income and not as capital. *In re* THOMAS. ANDREW *v.* THOMAS **Sargant J. 383**

2. —— *Lease — Surrender — Grant of New Lease for longer Term at increased Rent—Excess Rent during Unexpired Period of Surrendered Term—Capital or Income—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 6 (i.); *s.* 7, *sub-ss.* 1, 2; *s.* 8, *sub-s.* 1; *s.* 13, *sub-ss.* 1, 5, 6.

Where a tenant for life in bona fide exercise of the powers conferred upon him by s. 13 of the Settled Land Act, 1882, accepts a surrender of an existing lease of settled land and grants a new lease of the same land for a longer term at an increased rent he is entitled to retain for his own benefit the excess rent during the unexpired period of the surrendered term and no portion of it ought to be retained and capitalized by the trustees. *In re* WIX. HARDY *v.* LEMON **Younger J. 279**

TENANT FOR LIFE AND REMAINDERMAN —*continued.*

TENANT IN TAIL — Will — Perpetuity — Personalty settled by reference to realty—Adult tenant in tail in possession—Construction – – – – **91**
See WILL. 13.

TESTAMENTARY APPOINTMENT – **467, 502,** *See* SETTLEMENT 2, 6, and WILL, 14. **552**

TRADE MARK—*Registration—Combination of Letters — Surname spelt backwards — Invented Word—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 11.

J. C. Cording, Limited, carried on business in Piccadilly, and Geo. Cording, Limited, in Regent Street. Both companies and their respective predecessors in title had for many years carried on business as manufacturers and sellers of waterproof goods, but neither company had a right to the exclusive use of the word "Cording."

In 1914 Geo. Cording, Limited, who were the registered proprietors of the trade mark "Gnidroc" in class 38 in respect of waterproof clothing, applied to register the same word as their trade mark in class 40 for indiarubber and gutta-percha goods. The application was opposed by J. C. Cording, Limited, but the registrar decided against them. Thereupon they appealed, and also moved to expunge the word "Gnidroc" from the register in respect of goods in class 38, and the two applications came on together :—

Held by Neville J., that "Cording" spelt backwards was registrable as a trade mark; but

Held by the Court of Appeal, that the application of Geo. Cording, Limited, was not made bone fide and that "Gnidroc" was intended and calculated to deceive within s. 11 of the Trade Marks Act, 1905; that it ought not to be registered in class 40 and ought to be expunged from class 38. *In re* GEO. CORDING, LD.'S APPLICATION – – – – **C. A. 422**

2. —— *Registration—Discretion of Registrar—Letter Marks—Initials of Firm spelt out—"Ogee"—Dictionary Word—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 9, 11, 12, 19.

Subject to the limitations imposed by the Trade Marks Act, 1905, the registrar has a discretion to refuse or accept an application for the registration of a mark, but his exercise of that discretion must not be unreasonable or capricious.

G., trading as O. G. & Co., applied to register the word "Ogee" as a trade mark in class 3. O. G. & Co. were an old firm. They had many years ago used first the letters "O.G.," the initials of the firm, and afterwards the word "Ogee" to distinguish their goods. In 1898 and 1903 they had, without opposition, registered "Ogee" in different classes, and had used the word as a trade mark in respect of goods in class 3, and their goods were known and sold as "Ogee" goods. The registrar refused the application on the ground that "Ogee" was simply the letters

TRADE MARK—*continued.*

"O.G." spelt out, and that letters could not be registered as distinctive marks.

Sargant J. reversed the decision of the registrar, holding that "Ogee" prima facie meant the dictionary word used in architecture, and that, having regard to the long user of the word by the applicant and his registration of it in other classes, the present registration ought to be allowed upon the applicant's disclaiming any exclusive right to the letters "O.G." or either of them :—

Held, on appeal, that s. 12, sub-s. 2, expressly gave the registrar a discretion, and it was also clear from *Eno* v. *Dunn* (1890) 15 App. Cas. 252, and *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* [1913] A. C. 624, that whilst the registrar was in certain cases prohibited from registering, still he had in cases where there was no such prohibition a discretion which must not be unreasonably or capriciously exercised. In the present case the registrar was right in refusing the application. If the application had been for the registration of the letters "O.G." it would have failed on the authority of *Registrar of Trade Marks* v. *W. & G. Du Cros, Ld.* "Ogee," although a dictionary word, represented the letters "O.G." written out. A trade mark appealed to the ear as well as the eye, and possible confusion might arise from the sound. The disclaimer of the exclusive right to use the letters themselves did not meet the case.

Decision of Sargant J. reversed. *In re* GARRETT'S APPLICATION – – **C. A. 436**

3. —— *Registration—Mark common to the Trade at Date of Registration—Rectification of Register — Combined Trade Mark — Note on Register—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 41.

Sects. 11 and 41 of the Trade Marks Act, 1905, are to be read together. Therefore a trade mark which has remained unchallenged on the register for more than seven years may nevertheless be removed from the register if at the date of its registration it was a mark common to the trade.

A combined trade mark which has been registered for more than seven years is not open to objection solely on the ground that part of it consists of a particular device which was common to the trade at the date of the registration of the trade mark. But if in an action for infringement the alleged infringement is not the user of the trade mark, as a whole, but the user of the particular device common to the trade, the action will fail and the proprietor of the combined mark may be required to place a note on the register to the effect that no claim is made for the exclusive use of the particular device. J. WIGFULL & SONS, LD. *v.* J. JACKSON & SON, LD. – – – – – **Neville J. 213**

4. —— *Registration — Similarity to Mark registered by another Proprietor—"Calculated to deceive" — "Honest concurrent user" — Jurisdiction and Discretion of the Court—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19, 21.

In s. 19 of the Trade Marks Act, 1905,—which provides that "except by order of the Court," or in the case of certain old marks, "no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive"—the first six words refer to orders of the Court made under s. 21 of the Act. That section provides that "in cases of honest concurrent user or of other special circumstances which, in the opinion of the Court, make it proper to do so, the Court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor," subject, if thought right, to any conditions or limitations; and the words "calculated to deceive" in s. 19 have a milder meaning than the same words have in s. 11, and the words "so nearly resembling such a trade mark as to be calculated to deceive" mean "so nearly identical as to be confusing." Sect. 19 therefore recognizes that the Court may order registration of a mark where it is either identical with a mark already registered or so nearly identical with the latter as to be confusing. The same two classes of cases are aimed at by s. 21, in which the words "the same trade mark" correspond with the word "identical" in s. 19, and the words "nearly identical trade marks" correspond with the words "so nearly resembling such a trade mark as to be calculated to deceive" in s. 19.

B. & Sons had on the register a trade mark in respect of butter and cheese (which mark they had never used for condensed milk), when M., who was an importer of condensed milk, applied for registration of a somewhat similar mark (each containing a representation of a cowslip) in respect of condensed skimmed milk. M. had for twenty-five years sold condensed milk under the name "Cowslip Brand," and the names "Cowslip Brand Condensed Milk" and "Cowslip Condensed Milk" had during that period distinguished his goods. B. & Sons did not oppose the application :—

Held, (1.) that the registrar had rightly refused the application; but (2.) that under ss. 19 and 21 the Court in its discretion could, and that it ought to, order the registration of M.'s mark to be proceeded with. *In re* MAEDER'S TRADE MARK APPLICATION – **Sargant J. 304**

TRUST TO CONVEY—Will — Perpetuity—Rule in *Whitby* v. *Mitchell* – – **467**
See WILL. 14.

TRUSTEE — Company — Leases to company—Dissolution of company – – **289**
See COMPANY. 6.

—— Power of appointment—Limited power—Appointment to trustees for objects—Settlement on objects — Transfer of fund – – – – – **125**
See POWER OF APPOINTMENT.

TRUSTEES—Power to appoint new – – **358**
See SETTLEMENT. 5.

TRUSTEES OF TERM — Settlement —Portions —Power to postpone raising - **511**
See SETTLEMENT. 4.

WILL — *Advances — Hotchpot — Division of Income till Distribution — Advanced Legatee charged with Interest—Rate of Interest—Rules of the Supreme Court*, 1883, *Order LV., r.* 64.

Testator, who died in 1913, bequeathed certain life annuities, and directed his trustees to carry on his business for not less than one year or more than two years from the date of his death, and gave directions for selling the same, including an offer to be made to two nephews, with provisions for payment of the purchase-money by instalments extending over seven years. He gave his residuary real and personal estate to trustees on trust for sale and investment, and directed them to hold the residuary trust funds in trust to pay the annuities, and subject thereto as to five sixteenth parts upon trust to invest the same and pay the income to his son S. during his life, with remainder to his children; and the testator declared that certain advances made to his son should not be treated as a debt owing to the testator, but should be brought into account by way of hotchpot in the division of the testator's residuary estate; and the testator directed the trustees to hold the remaining sixteenth shares upon trusts in favour of other persons and their children, and empowered his trustees to postpone sale and conversion, and directed the income of the unconverted property, including the profits from his business, to be applied from the date of his death in the same way as the income would have been applicable if such property had been converted and the proceeds invested; and he especially directed his trustees to continue to hold as long as they should think fit his shares in certain companies, whether authorized or not under the investment clause contained in his will, without being responsible for any loss. The testator's estate consisted largely of shares in these companies, in which there was no free market and which were incapable of any accurate valuation. The average rate of interest earned by the estate since the testator's death exceeded 9 per cent.:—

Held, that the case was not one for an immediate valuation of the residuary estate and that pending the final division of the estate the advanced son ought to be charged with interest on the amount of his advance at the rate of 4 per cent. only.

In re Poyser [1908] 1 Ch. 828, *In re Craven* [1914] 1 Ch. 358, and *In re Forster-Brown* [1914] 2 Ch. 584 followed.

In re Hargreaves (1903) 88 L. T. 100 distinguished. *In re* COOKE. RANDALL *v.* COOKE
Younger J. 480

2. —— *Ambiguity—Bequest—Furniture and all other Articles of Personal, Domestic, or Household Use—"Carriages"—Motor Car—Will—Construction.*

Testator by his will bequeathed to his two daughters all his "furniture, plate, plated articles, linen, glass, china, books (except books of account), pictures, prints, stationery, musical instruments, articles of virtu, and all other articles of personal, domestic, or household use or ornament belonging to me, and all my horses, carriages, harness, saddlery and stable furniture."

At the date of his will the testator possessed horses and carriages, but no motor car. After the date of his will he sold his horses and carriages and purchased a motor car which belonged to him at his death:—

Held, that the motor car did not pass under the gift of "carriages" but passed under the gift of "furniture and all other articles of personal, domestic, or household use" to the testator's two daughters.

In re Hall (1912) 107 L. T. 196; [1912] W. N. 175, followed.

In re Ashburnham (1912) 107 L. T. 601; [1912] W. N. 234, commented on.

Denholm's Trustees v. *Denholm*, 1908 S. C. 43; 45 S. L. R. 32, approved but not followed. *In re* WHITE. WHITE *v.* WHITE
Younger J. 172

3. —— *Ambiguity—Evidence—Misdescription of Legatee—Parol Extrinsic Evidence.*

A testatrix gave "No. 83 Cambridge Road to my great nephew Frederick Johnson." In an earlier part of her will she had given another house "to my great nephew Richard Johnson." She had no relations of the name of "Johnson," but had a niece Elizabeth Johnstone, who had three sons, Robert William Johnstone, Joseph Francomb Johnstone (known as "Frank"), and Richard Johnstone:—

Held, that extrinsic evidence was admissible to show the intention of the testatrix that Joseph Francomb Johnstone was the person to take No. 83, Cambridge Road. *In re* RAY. CANT *v.* JOHNSTONE - - - **Sargant J. 461**

4. —— *Class—Joint Tenancy or Tenancy in Common—Advancement Clause—Class taking original Share by Substitution.*

An advancement clause that applies during the minority of "any person entitled to a benefit" under a will is a sufficient indication that the members of any class, whether that class be original or substitutionary, are to take as tenants in common.

L'Estrange v. *L'Estrange* [1902] 1 I. R. 467 followed. *In re* DUNN. CARTER *v.* BARRETT
Astbury J. 97

5. —— *Class—Life Interest—Gift in Reversion to Next of Kin—Class, when to be ascertained—Artificial Class.*

A testator who died in 1880 by his will gave 1200*l.* out of his residuary estate upon trust to invest and to pay the income to G. M. for life, and after his decease to pay the income to E. M., the wife of G. M., for life, and after the decease of the survivor of them upon trust for the person or persons who at the decease of such survivor should be of the blood of G. M. and of kin to him and who would under the Statutes of Distribution of Intestates Effects be entitled to his personal estate as if he were dead unmarried and

WILL—*continued.*

intestate. G. M. died in 1882, and E. M. died in 1915 :—

Held, that the gift was to an artificial class consisting of the next of kin of G. M. to be ascertained as if he had died on the day of the death of E. M. *In re* MELLISH. DAY *v.* WITHERS – – – – **Neville J. 562**

6. —— *Codicil—Construction—Revocation—Residuary Disposition in Will — Bequest in Codicil of "the residue of my estate not bequeathed by the above will."*

A testator, by his will dated December 21, 1912, after making numerous specific and pecuniary bequests and devising certain lands for charitable purposes, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust to sell, and, after making certain payments therein directed, to hold the residue and the income thereof in trust, as to one third, for the Society for Promoting Christian Knowledge, and as to the other two thirds for the vicar of I. for purposes connected with his church. By a codicil dated February 17, 1915, after referring to his will, he gave and bequeathed "the residue of my estate not bequeathed by the above will" to M. A. L. absolutely, and appointed her sole executrix of the codicil. He died on February 27, 1915 :—

Held, reversing the decision of Eve J. [1915] 2 Ch. 295, and following *Earl of Hardwicke* v. *Douglas* (1840) 7 Cl. & F. 795, that the residuary gift in the will was revoked by the codicil, and that under the gift in the codicil the whole of the testator's estate undisposed of by legacies or specific bequests passed to M. A. L. *In re* STOODLEY. HOOSON *v.* LOCOCK – **C. A. 242**

7. —— *Contingent Remainder—Class Gift—Legal Devise—Failure of Particular Estate—Preservation of Entire Remainder—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, 3.

A testator who died after January 1, 1898, when the Land Transfer Act, 1897, came into operation, devised a freehold house to the use of his daughter for life, with remainder to the use of such of her children as should attain twenty-one in equal shares as tenants in common.

The daughter died in 1915, having had and leaving four children, two of whom had attained twenty-one during her life, and two were still infants.

The executors had assented to the devise during the life tenancy :—

Held, first, that, having regard to the initial vesting of the estate in the executors under the Land Transfer Act, 1897, the devisees originally took equitable estates only, so that the contingent remainders were originally immune from destruction.

Secondly, that the contingent remainders retained their original immunity though subsequently clothed with the legal estate on the executors' assent.

In re Freme [1891] 3 Ch. 167 applied. *In re* ROBSON. DOUGLASS *v.* DOUGLASS **Astbury J. 116**

WILL—*continued.*

8. —— *Costs—Difficulty occasioned by Language of Testatrix—Provision for Payment of Future Duties—Payment of Legacy to Legatees in whom was Entire Interest as Trustees for themselves—Rules of the Supreme Court*, 1883, *Order XLV., r.* 14B.

Testatrix by her will bequeathed to H. a legacy of 8000*l.* "and in the event of his death unmarried to his mother B.," and gave the residue of her estate to D. The will contained no directions as to the incidence of testamentary expenses and the legacy had not been separated from the general estate. Questions having arisen as to the interests taken by H. and B. respectively in the legacy, the executor took out an originating summons for their determination and expressly asked that the costs of the application might be paid out of the legacy :—

Held, on the construction of the gift, that the legacy vested absolutely in H. on the death of the testatrix, but subject to a gift over to B. in the event of his dying a bachelor, and, by consent, the legacy, less legacy duty, was ordered to be paid to the two legatees as trustees for themselves according to their respective interests in it.

Held, also, that the necessity for the summons was entirely attributable to the ambiguity of the language used by the testatrix herself, and that the costs of the summons were accordingly costs of administration and therefore payable as between solicitor and client out of the residue.

Trethewy v. *Helyar* (1876) 4 Ch. D. 53; *Eyre* v. *Marsden* (1838) 4 My. & Cr. 231; and *In re Giles* (1886) 55 L. T. 51 followed.

Att.-Gen. v. *Lawes* (1849) 8 Hare, 32, and *Martineau* v. *Rogers* (1856) 8 D. M. & G. 328 explained.

Held, further, that r. 14B of Order LXV. did not apply to a case where the difficulty necessitating the application was directly attributable to the imperfect phraseology of the testatrix herself. *In re* HALL-DARE. LE MARCHANT *v.* LEE WARNER – – – **Younger J. 272**

9. —— *Death Duties—Annuity and Legacies to Wife, Gift of — Settlement Estate Duty—Legacy Duty—Appropriation of Fund to pay Annuity out of "net income" — Incidence of Duties—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 58, *sub-ss.* 2, 4.

Testator, who died prior to the passing of the Finance (1909-10) Act, 1910, by his will, made in 1908, bequeathed certain articles and sums of money "free of duty," and then bequeathed to his wife his jewellery and certain household goods and effects, and also bequeathed to her two pecuniary legacies and a life annuity, in each case without any mention of duty. He also bequeathed pecuniary legacies and life annuities to other persons, all "free of duty," and gave the residue of his real and personal estate to trustees on trust to sell and convert and out of the proceeds to pay his funeral and testamentary expenses and pecuniary legacies (other than annuities) and the duty on such specific and

WILL—*continued.*

pecuniary legacies and annuities as were bequeathed free of duty, and upon trust to invest the residuary moneys and out of the income of his residuary estate to pay the annuities thereinbefore bequeathed until the payment thereof should be provided for as thereinafter directed, and subject thereto settled his residuary estate on certain persons for their respective lives, and after their respective deaths on their respective children ; and he thereby authorized and directed his trustees to appropriate out of his residuary estate such part thereof as should at the time of such appropriation be sufficient to answer by means of the "net income" thereof the annuities thereinbefore bequeathed, and directed that upon such appropriation being made the rest of his residuary estate should be discharged from the annuities, and directed that the trustees should by means of the income of the annuity fund, or, if that were insufficient, then by means of the capital, pay the annuities thereinbefore bequeathed and apply the surplus, if any, of the income as if it were income arising from the rest of his residuary estate, and as the annuities fell in directed a proportionate part of the annuity fund to fall into his residuary estate.

The trustees had appropriated an annuity fund accordingly :—

Held, that the settlement estate duty payable in respect of the annuity fund was payable out of the residuary estate and not out of the annuity fund.

Held, also, that the widow must bear in respect of as well her annuity as her specific and pecuniary legacies the legacy duty imposed by s. 58 of the Finance (1909-10) Act, 1910. *In re* WALLER. MARGARISON *v.* WALLER

Sargant J. 153

10. —— *Death Duties—Estate Duty—Settled Legacy—"Free of all duties"—Annual Sum out of Income of Residue—New Duty imposed after Death of Testator—Incidence of Duties—Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

Testator, by will made in 1910, bequeathed to trustees the sum of 25,000*l.* upon trust during the life of his wife to pay the income to the person who would for the time being be entitled as tenant for life or tenant in tail to the rents of his settled hereditaments if his wife were then dead, and after the death of his wife directed the said sum to fall into his residue ; and directed that all legacies thereinbefore given or which might be given by any codicil should be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees ; and the testator thereby devised his settled hereditaments to his trustees upon trusts in favour of his wife during her life, and after her death devised the settled hereditaments to the use of his nephew A. for life, with remainder (in the events which happened) to his nephew B. for life, with remainder to the use of B.'s children in strict settlement ; and the testator thereby gave his residuary real and personal estate to his trustees upon trust for sale and conversion, and upon trust out of the moneys so to arise to pay his funeral and testamentary expenses and legacies and to make provision for

WILL—*continued.*

the payment of all duties on any bequests thereinbefore made free from duties or deductions for duties, and to invest the residue upon trust out of the income thereof to pay an annual sum of 3000*l.* to the person who would be so entitled as tenant for life or in tail as aforesaid, and to hold the surplus income upon the trusts therein mentioned.

The testator died in 1913. A. died a bachelor in 1915. On a summons raising the question how as between the beneficiaries under the will the estate duty payable on A.'s death imposed since the testator's death by virtue of the Finance Act, 1914, s. 14, ought to be borne :—

Held, that the estate duty payable in respect of the settled legacy of 25,000*l.* must be borne by the residuary estate, but that the estate duty on the notional sum required to produce the annual sum of 3000*l.* must be borne by that sum.

In re Parker-Jervis [1898] 2 Ch. 643 followed.

In re Snape [1915] 2 Ch. 179 distinguished. *In re* PALMER. PALMER *v.* PALMER

Younger J. 395

11. —— *Forfeiture Clause—General Clause applicable to both Vested and Contingent Gifts—Alienation while Gift contingent—Repugnancy.*

A testator gave a legacy of 100*l.* to his wife, a lease of his business premises to one of his two sons, the goodwill to his two sons, and a number of pecuniary legacies to several persons, all these gifts taking effect on testator's death. He gave the residue of his property upon trust for his wife during widowhood and, after her death or remarriage, unto and equally between such of his children as should then be living. The will then contained a forfeiture clause providing that if (by reason of bankruptcy or any other act or deed of any beneficiary under the will, or by operation of law) any share, interest, legacy, income, or other benefit under the will, if his or her own absolute property, in the absence of the clause would become vested in or payable to or for the benefit of any assignee or creditor of such beneficiary, then, as to the whole or part which, but for the clause, would be so vested or payable, the trusts declared in favour of the beneficiary should cease and determine, and the trustees of the will should hold such interest or benefit for the use, maintenance, or benefit of the beneficiary or his or her family in such manner and at such times or periods as the trustees should think best. Between the deaths of the testator and his widow one son was adjudicated a bankrupt and a daughter assigned her interest by way of mortgage :—

Held, that the forfeiture clause could not be split up so as to be pronounced valid as to the contingent gifts only, but that the whole of the clause was void for repugnancy, and that it was immaterial that the events on the happening of which forfeiture was alleged to have taken place occurred while the interests said to be affected were contingent.

In re Jones's Will (1870) 23 L. T. 211 approved. *In re* SMITH. SMITH *v.* SMITH

Sargant J. 369

WILL—*continued.*

12. —— *Lapse by Death of "Legatee" — Provision against—Whether applicable to Residuary Legatee—Bequest by Codicil.*

Testatrix by her will made in 1894 gave a number of specific and pecuniary legacies and disposed of her residuary personal estate and directed that all bequests and legacies given to married women should be for their separate use, and that "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." The testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will and any previous codicil or codicils, and died in 1915 :—

Held, that the provision in the will against lapse extended to the residuary bequest.

Held, also, that it equally extended to a bequest contained in a codicil, the expression "this my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will and codicils at the date of the testatrix's death. *In re* SMITH. PRADA *v.* VANDROY - - - - **Sargant J. 523**

13. —— *Perpetuity — Personalty settled by Reference to Realty—Adult Tenant in Tail in Possession—Construction.*

Testator gave his real and personal estate to trustees as to the personal estate upon trusts for conversion and investment and upon trust to pay the income thereof to the person (if any) who under the trusts or limitations thereinafter contained should for the time being be tenant for life of or otherwise entitled to the possession or receipt of the rents and profits of his real estate until such real estate should become vested in some person who should become adult tenant in tail thereof in possession, and from and after the happening of such last mentioned event then as to both capital and income upon trust for such last mentioned person absolutely ; and as to his real estate upon trust for his brother during his life, and from and after his death upon trust for the first and every other son of his said brother successively in remainder one after another according to their respective seniorities in tail general :—

Held, that the trust of the personal estate in favour of the person who should become adult tenant in tail in possession could not be construed as applying to a tenant in tail by purchase only, and was therefore void for remoteness.

Ibbetson v. *Ibbetson* (1840) 5 My. & Cr. 26 and *Lord Dungannon* v. *Smith* (1846) 12 Cl. & F. 546 followed.

Christie v. *Gosling* (1866) L. R. 1 H. L. 279 and *Martelli* v. *Holloway* (1872) L. R. 5 H. L. 532 distinguished, and a passage in the head-note to the report of *Martelli* v. *Holloway* (L. R. 5 H. L. 532) commented on as being too widely stated. *In re* ATKINSON. ATKINSON *v.* ATKINSON - - - - **Sargant J. 91**

WILL—*continued.*

14. —— *Perpetuity — Rule in* Whitby *v.* Mitchell—*Equitable Limitations—Trust to convey—Settlement of Equitable Estate in Remainder or Expectancy—Testamentary Appointment —Conversion—Date for ascertaining Real Estate within Rule.*

The rule in *Whitby* v. *Mitchell* (1890) 44 Ch. D. 85, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of that unborn person, applies to any settlement of a fee simple estate, whether legal or equitable, and whether in possession, remainder, or expectancy.

For the purposes of this rule there is no difference between freehold and copyhold estate.

Where a settlement of real estate contains a power to the trustees to convert the real estate and gives a special power of appointment over the property, in considering the application of the rule the nature and quality of the property must be regarded as at the time when the appointment becomes operative and not as at the date of the settlement by which the power is given.

By a settlement dated in 1861 freehold lands were conveyed by A. to a trustee in fee upon trust to pay the net income to A. for life, and after his death upon trust to pay out of the said income an annuity, and subject thereto upon trust to convey the estate as A. should by will appoint. A., who died in 1887, by his will appointed the lands to trustees, upon certain trusts by way of settlement :—

Held, following *Tatham* v. *Vernon* (1861) 29 Beav. 604, that in 1893, when the annuitant was still living and the lands were still vested in the original trustee, the beneficiaries under A.'s will had nevertheless equitable estates in the lands, and not merely equitable executory interests. *In re* CLARKE'S SETTLEMENT TRUST. WANKLYN *v.* STREATFEILD - **Younger J. 467**

15. —— *Real Estate—"Statute for the distribution of the estates of intestate persons."*

Testatrix devised and bequeathed her real and personal estate to trustees upon trusts in favour of her two children or their issue, and after the death of her last surviving child directed her trustees to sell and convert her real and personal estate and divide the proceeds among her grandchildren as therein mentioned, and in case both her children should die without leaving issue (which event happened) directed her trustees to stand possessed "of my real and personal estate and the proceeds of the same upon trust for those persons who would be entitled thereto under the statute for the distribution of the estates of intestate persons in like manner as if my said surviving child had been absolutely seised and possessed of the said real and personal estate and had died intestate." On a summons raising the question whether the heir-at-law or the statutory next of kin of the last surviving child or the heir-at-law of the testatrix became entitled to the real estate of the testatrix :—

Held, that upon the true construction of the will the real estate could not be treated as a

converted fund; that the words "under the statute for the distribution of the estates of intestate persons" meant no more than if for these words there had been substituted the words "by law"; and that the heir-at-law of the last surviving child was therefore entitled to the real estate.

In re Hudson (1895) 72 L. T. 892 commented on. *In re* HUGHES. LODDIGES *v.* JONES
Younger J. 493

16. —— *Residuary Personal Estate — "Money"—Admissibility of Extrinsic Evidence.*

Testatrix, who died in 1914, by her will, made in 1904, directed her debts to be paid, and gave and bequeathed her "money" unto her two nieces to be equally divided between them after 20*l.* had been paid to her executor, and expressed her wish that all her personal property in the house of either of her two nieces at the time of her death should belong to such niece.

At the date of her death the testatrix was possessed of cash in the house, money on deposit at her bank and at the Post Office Savings Bank, a sum of Consols, and household goods, together with some small personal belongings in the house of one of her nieces. On an originating summons raising the question what passed under the bequest of "money":—

Held, that extrinsic evidence was admissible to show of what property the testatrix was possessed at the date of her will as evidence of surrounding circumstances only.

Held, also, that on the true construction of the will standing alone the word "money" comprised the whole of the residuary personal estate. *In re* SKILLEN. CHARLES *v.* CHARLES
Sargant J. 518

17. —— *Residue, Shares of—Period of Distribution — Hotchpot — Advanced and Unadvanced Shares.*

The testator by his will made in 1892 appointed his wife and his sons J. and A. executors and trustees, and after certain legacies, including a trust legacy to his trustees, he made a general devise and bequest to his said trustees upon trust to sell and convert as and when they should think expedient, and provided that the income of his estate should be treated like the income of the investments which would arise from the proceeds of sale until conversion. Then he provided for four sums of 6000*l.* for each of his daughters, and for the settlement of the legacy of the daughter who was then unmarried, the other three sums being given to the trustees of the married daughters' settlements. And he declared that the will was made on the assumption that the residuary real and personal estate disposed of thereby (including the money to the income of which his wife was entitled under the trusts of the settlement executed on their marriage and the sums of 5000*l.* and 2300*l.* or thereabouts which he had paid on account of his son J., which sums were to be deducted from the share of his residuary estate thereinafter given in trust for the benefit of the son's wife and family), after payment thereout of his debts, funeral and testamentary expenses, and the legacies thereby given, other than legacies to his wife or any of his children, would amount to upwards of 60,000*l.*, and gave directions in case that assumption was not realized. Then the trustees were to stand possessed of the residue of his residuary estate after payment of the money before mentioned, "as to one half on trust to pay, transfer, or invest the same in the names of his wife and his son A. to be held upon trust to pay the annual income to M., the wife of J., for life for her separate use, and without power of anticipation," and after her decease upon trusts for their family. Then testator directed the general trustees of the will (who were different persons from the trustees of J.'s share) to hold the other moiety of the residue upon trusts in favour of A. and his wife and family. By another material clause (although it did not actually take effect) testator provided that if he should at any time thereafter give to any son or daughter any sum exceeding 1000*l.* at any one time, any sum so advanced should be considered as a payment by him on account of the sums thereinbefore bequeathed to or in trust for him or her, or his or her children, and that the amount so given (with interest from the date of the advance) should be brought into account and deducted from the sum thereinbefore bequeathed to him or her. The testator died in 1893 leaving his widow and several children of their marriage.

A large part of the estate was not realized, and a number of investments were, down to 1910, appropriated to the two sons' settled shares, the appropriations to A.'s share exceeding those to J.'s share, the amount to be accounted for by the latter being thus reduced to 4000*l.* The income of the unappropriated estate was for a time applied on the principle of *In re Hargreaves* (1903) 88 L. T. 100, and afterwards on the principle of *In re Poyser* [1908] 1 Ch. 828:—

Held, that the latter principle ought to have been acted on throughout, and that the apportionment of capital as between the two shares should be made on a corresponding principle.

The rule laid down in *In re Rees* (1881) 17 Ch. D. 701 still prevails. *In re* TOD. BRADSHAW *v.* TURNER – – **Sargant J. 567**

18. —— *Settled Estates—Limitations to A. for Life, Remainder to B. in Tail—Codicil giving A. an exclusive Power by Deed or Will to appoint to a Class—A. a Member of the Class—B. not a Member—Revocation of Codicil—Restoration of Codicil on A.'s Promise not to interfere with B.'s Succession—Appointment by A. to himself in Fee—Fraud—Promise enforced—Invalid Appointment.*

By the will and five codicils of a testator real estates were settled to the use of his wife during widowhood, remainder to the use of A. for life, remainder to the use of the first and every other son of A. successively in tail male, remainder to the use of such person or persons of a special class as A. should by deed or will appoint, remainder in default of such appointment to B. for life, remainder to the first and every other son of B. successively in tail male, with remainders over.

A. was married but had no children. He was

WILL—*continued.*

a member of the class, B. was not. The testator's wife, desiring that B. should not be excluded from succeeding to the estates, induced the testator to make a sixth codicil by which he revoked the power of appointment given to A. by the fifth codicil. On hearing of this A. had an interview with the testator's wife at which he gave her his written promise to leave the estates to B. on acquiring the power to do so if she would get the testator to revoke the sixth codicil. The testator's wife communicated this promise to the testator, who thereupon destroyed the sixth codicil. After the testator's death A. by deed appointed the estates to himself in fee on failure of his issue male. In an action by B. to enforce the promise :—

Held, that the appointment was fraudulent and void, for that A. could not exercise the power so as to interfere with B.'s right of succeeding to the estates.

Quaere, whether the donee of an absolute and exclusive power of appointment in favour of a special class can bona fide exercise the power by appointing to himself, he being a member of the class. THARP *v.* THARP – **Neville J. 142**

19. —— *Substitutional Gift—Issue—Parent.* Testatrix gave her [illegible] estate subject to a life interest to five named nephews and nieces, and directed that, if any of them should die in the lifetime of the tenant for life leaving "issue," such issue should take the share which his, her, or their deceased "parent" would have taken if living; but if any of them should die in the lifetime of the tenant for life without leaving "issue" him or her surviving, the share of the one so dying should be divided amongst the survivor or survivors and the "issue" of him, her, or them so dying and leaving issue :—

Held, that the word "issue" in each branch of the clause must be confined to children.

WILL—*continued.*

Sibley v. *Perry* (1802) 7 Ves. 522 applied. *Ross* v. *Ross* (1855) 20 Beav. 645; *Ralph* v. *Carrick* (1879) 11 Ch. D. 873; and *In re Embury* (1913) 109 L. T. 511 distinguished. *In re* TIMSON. SMILES *v.* TIMSON – – – **Younger J. 293**

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—— "Carriages" : *In re* WHITE [1916] **1 Ch. 172**

—— "Honest concurrent user" : *In re* MAEDER'S TRADE MARK APPLICATION [1916] **1 Ch. 304**

—— "Issue" : *In re* TIMSON. SMILES *v.* TIMSON – – – [1916] **1 Ch. 293**

—— "Mines and minerals" : ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* ROSSE **C. A.** [1916] **1 Ch. 73**

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